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IN THE

Supreme Court of the United States

October Term, 1957.

CITY OF NASHVILLE, TENNESSEE, et al., - - - - - Appellants,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., - - Appellees.

No. 365.

MOTION OF APPELLEE LOUISVILLE AND NASHVILLE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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MOTION OF APPELLEE LOUISVILLE AND NASHVILLE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Louisville and Nashville Railroad Company, appellee in the above-entitled case,[1] moves that the judgment below be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In support of this motion this appellee respectfully presents the following:

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[1]Intervening defendant below, as of right, under 62 Stat. 970 (1948), as amended, 63 Stat. 105 (1949); 28 U. S. C. §2323. Appellee received appellants' Jurisdictional Statement on August 10, 1957.

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

This action involves an attack on an order of the Interstate Commerce Commission[2] authorizing the merger of The Nashville, Chattanooga and St. Louis Railway (herein called N.C.& St.L.) into the Louisville and Nashville Railroad Company (herein called L.& N.), under Section 5(2) of the Interstate Commerce Act.[3] The three-judge court below made the following finding of fact:

> "9. A comprehensive record was made before the Commission, which held three separate hearings. The transcript of testimony covers 1,733 pages. There were numerous and elaborate exhibits. Extensive briefs, exceptions to the Examiner's proposed report and replies to such exceptions were submitted to the Commission, numerous other documents were filed, and the parties were heard on oral argument by ten members of the Commission, one member not participating. The decision of the Commission was unanimous." (pp. 5-6, typewritten copy of decision; p. 5a, Appendix A, Appellants' Jurisdictional Statement)

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[2]Dated March 1, 1957, but which, after postponements required by the proceeding below, did not become effective until August 14, 1957, under a subsequent order of the Commission dated July 10.

[3]24 Stat. 380 (1887), as amended, 54 Stat. 905 (1940), 63 Stat. 485 (1949); 49 U.S.C. §5(2).

The court below stated:

". . . The court has considered the pleadings and the proceedings and evidence adduced before the Interstate Commerce Commission, the entire record in the case, and the oral arguments and briefs of the attorneys for the plaintiff, for the defendants, and for all the interveners, constituting all the parties. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction." (p. 1, typewritten copy of decision; p. 1a, Appendix A, Appellants' Jurisdictional Statement)

Included in its Findings of Fact[4] is the following:

". . . The designated three-judge court assembled and heard elaborate oral arguments at morning and afternoon sessions on May 7, 1957, following which the case was duly submitted." (p. 9, typewritten copy of decision; p. 9a, Appendix A, Appellants' Jurisdictional Statement)

By its decision of May 24, 1957, the court upheld the order of the Commission.

We believe it appropriate and desirable to supplement, in order to bring down to date, the statement of steps taken in this proceeding as recited at page 6 of appellants' Jurisdictional Statement.

On August 10, 1957, appellants, and also the N.C.& St.L. Railway Employees Job Protection Association, served on appellee motions for a stay directed to Mr. Justice Brennan, and appellee opposed said motions

[4]Finding of Fact No. 16.

by a reply dated August 12, 1957. Mr. Justice Brennan denied the motions on August 15, 1957.

We believe it should also be explained that following this, or on August 30, 1957, the merger of the N.C.& St.L. into the L.& N. became effective, hence this motion to affirm is made in behalf only of appellee Louisville and Nashville Railroad Company rather than that Company and The Nashville, Chattanooga and St. Louis Railway, intervening defendants below.

Appellants as plaintiffs below raised a great variety of questions which, if not frivolous, were at most of a scatter-shot variety. After considering them all, the court below in its Conclusion of Law No. 10 held:[5]

> "Neither the plaintiff nor any of the intervening plaintiffs has shown any ground upon which the court could justify an order annulling, vacating, or setting aside the order of the Commission." (p. 13, typewritten copy of decision; pp. 12a-13a, Appendix A, Appellants' Jurisdictional Statement).

We shall take up one by one the questions presented on appeal and show (1) that each one of them is unsubstantial, and (2) that some of them are not even timely or properly raised, as hereinafter specified.

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[5]The decision of the court below was unanimous.

Summary of Argument.

Although many questions, bearing twelve numbers but being more than twelve in fact, since some of the questions numbered embrace more than a single question, are presented by appellants, none of them is substantial.

The Interstate Commerce Commission has correctly interpreted and applied Sections 5(2) and (11) of the Interstate Commerce Act as those statutes relate to railroad mergers.

It is not for the Commission, but for the courts, to determine whether in a given situation there has been a violation of the Sherman Act. Aside from that, permissibility of railroad mergers under the Interstate Commerce Act is not to be measured by the standards of the antitrust laws.

The various procedural questions raised by appellants disclose no prejudicial error in the decision of the Commission.

The three-judge court below correctly decided the issues and was entirely right in concluding that the considerations involved in a determination of whether a proposed merger of two railroads would be "consistent with the public interest" were matters within the special competence of the Commission.

The Commission made the necessary findings to support its ultimate conclusion that the merger proposed would be consistent with the public interest, which findings are supported by the evidence.

The Commission's report meets the standards of the Administrative Procedure Act.

The question whether the Mercantile-Safe Deposit & Trust Company was a necessary party to the application before the Commission is not jurisdictional, comes too late, having been raised for the first time before the District Court, and appellants have no legal interest in the question.

The Commission gave the requisite public notice in the issuance of its orders.

Some of the questions raised here may not properly be considered because they were not raised below.

Question 1 Presents No Substantial Question.

Appellants' Question 1 is whether the national transportation policy[4] was correctly interpreted by the Interstate Commerce Commission.

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[4] This statement of policy prefaces the Interstate Commerce Act, 24 Stat. 379 (1887), as amended; 49 U.S.C. §1, *et seq.*, and reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

The language quoted by appellants from the Commission's report to support the stated question relates to an interpretation of Section 5(2) of the Interstate Commerce Act, not of the national transportation policy.

The statement of the Commission to which appellants take exception is that Section 5(2) does not "contemplate the unification of only those railroads which can no longer continue under separate ownership," the Commission thereafter reasserting its administrative interpretation of that section rendered in *Detroit, T. & I. R. Co. Control*, 275 I. C. C. 455, 489 (1950), that it is designed to "foster and promote the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the public interest."

The purpose of the law contained in Section 5(2) of the Interstate Commerce Act was clearly stated by this Court in *United States* v. *Lowden*, 308 U. S. 225, 232 (1939), as follows:

> ". . . As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other."

Transportation Act, 1920,[7] made major revisions in the Interstate Commerce Act. *Wisconsin R.R.Comm. v. C.B.& Q.R.R.Co.*, 257 U. S. 563, 585 (1922); *New England Divisions Case*, 261 U. S. 184, 189-190 (1923); and *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478 (1924).

By the Transportation Act of 1940,[8] Section 5 of the Interstate Commerce Act underwent a major revision (what is now Section 5(2) was, prior to 1940, Section 5(4)), but it was not one which made any change in the law's purpose to favor and foster carrier consolidations. It was a change, as this Court subsequently explained in *Schwabacher v. United States*, 334 U. S. 182 (1948), to substitute "voluntary plans of merger or consolidation" for a nationwide plan of consolidations charted by the Commission under a directive of the Congress.

All provisions of the Act must be administered "with a view to carrying out" the national transportation policy, which, among other things, looks to the promotion of "safe, adequate, economical, and efficient service" and calls upon the Commission "to foster sound economic conditions in transportation and among the several carriers." The action of the Commission in this case was strictly in keeping with that mandate. This is shown in the findings of fact of the court below, which include the following:

> "10. The Commission concluded that 'the merger would enhance the adequacy of service by

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[7] 41 Stat. 456 (1920).
[8] 54 Stat. 898 (1940).

the merged companies, and would constitute the best use of the facilities' of the involved companies; that savings approximating $3,243,123 per annum—and probably more—may be expected from the merger; that such 'savings and improved efficiency of operation necessarily would strengthen the applicants, and render them capable of better service'; that 'Applicants have spent vast sums of money in improvements to their equipment and plant'; that additional large improvements are in contemplation, but that 'Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger'; and that 'anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad.' " (p. 6, typewritten copy of decision; pp. 5a-6a, Appendix A, Appellants' Jurisdictional Statement)

Appellants have persisted in asserting (pp. 15, 17) that the involved merger is one of "two strong railroads"—in the face of the fact that the record clearly shows that this is not the case.[9] Appellants here

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[9]The record clearly shows that the N.C.& St.L. had proved vulnerable to adversity. It had a very difficult time during the depression years, as appears in Ex. H-10, sheet 1 (Tr. 427-8, 461), Ex. H-20, sheets 9-12 (Tr. 862. 902), and Ex. H-22, sheet 1 (Tr. 971, 1005). Thus, Ex. H-10, sheet 1 (Tr. 427-8, 461), shows that the N.C.& St.L. operated at a deficit in 1931, 1932, 1933, 1934, 1935 and 1937 and had earnings of only 20 cents a share in 1936 and 56 cents a share in 1938. The L.& N. results are shown to have been much superior to those of the N.C.& St.L. in that period, the L.& N.'s only deficit having been in 1932.

The two railroads experienced a 58-day strike in 1955 and the come-back of the N.C.& St.L. was a slow, stunned one. Please see pp. 468-469 of 295 I. C. C. 457 and Tr. 34-35, 186-187, 434-435 and 810.

(Footnote continued on following page)

endeavor to support the assertion by the rather devious process of quoting the Commission's statement of their own contention that the "Tennessee Company is not a weak railroad" (p. 14), by then stating that in its assailed interpretation of Section 5(2) of the Interstate Commerce Act the Commission "did not question the premise that the N & C is not a weak railroad" (p. 14) and by then quoting one finding of the

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The record further shows that the L.& N. as owner of approximately 75% of the N.C.& St.L. stock, had aided the N.C.& St.L. materially in many ways. Thus the Commission found (295 I. C. C. 457) that the L.& N. guaranteed the N.C.& St.L. bonded indebtedness with its own strong credit (p. 464); that it enabled the latter to eliminate the burden of operating a dining car department (p. 468); and that it consistently endeavored to build up and contribute substantially to the traffic of the N.C.& St.L. "often at sacrifices to itself" (pp. 477 and 484). As the Commission also found, more than one-third of the N.C.& St.L.'s important interline traffic was interchanged with the L.& N., a heavy originator of traffic (p. 465). The record further shows that the N.C.& St.L. had no financial department, all the work of such department being done by the L.& N.'s financial department at no cost whatever to the N.C.& St.L. (Tr. 435); that at sacrifices to itself the L.& N. established superior passenger service in a manner that would most benefit the N.C.& St.L. (Tr. 163-164); and that the L.& N. worked diligently to locate new industry on the lines of the N.C.& St.L., a great new Ford plant having recently been located at Nashville on the line of the N.C.& St.L. (Tr. 610-614, 617-619). Yet, for all this help given the N.C.& St.L. by the L.& N., the record (Ex. H-64) shows that not once in the ten-year period 1945-1954 did the N.C.& St.L.'s rate of return on net property investment reach 5%; that in only three years did it reach 4%; that in four years it was less than 3%; and that in two years it was less than 2%.

How low these rates of return are may be appreciated in the light of the following expression from *Alabama Public Service Comn.* v. *Southern Bell T. & T. Co.*, 42 So. 2d 655, 672 (1949):

> "We say again that the rate of return of 4.5% on net investment amounts to confiscation. . . ."

(All references here and hereinafter to the abbreviation "Tr." with numbers in parentheses are to pages of the transcript of proceedings before the Commission, and all references to the abbreviation "Ex." are to exhibits in those proceedings.)

Commission that the N.C.& St. L. had shown substantial improvements in its operating results between 1946 and 1954 (p. 14). The Commission's report also shows the fact, not mentioned, that there was a sharp decline in the operating results of the N.C.& St. L. in 1955 and 1956.[1]

Appellants also assert (p. 16) that the two railroads are "naturally competitive rather than complementary"; that the Commission has found that it did not appear there "would be any immediate and direct improvement of service"; and that the language of the Commission when considered in the context of the facts means that any two connecting railroads should automatically be given permission to merge if they wish to do so, provided no other carrier objects and there is no alternative proposal under consideration. The conclusion here stated by appellants is altogether unsound and the facts as presented are misleading.

As to the appellants' conclusion, it should be said, first, that the primary statutory test in determining whether or not the Commission's approval of a proposed merger should be granted is whether the merger will be "consistent with the public interest." Section 5(2) of the Interstate Commerce Act.[2] *Schwabacher* v. *United States*, 334 U. S. 182, 194 (1948).

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[1]Please see the table at page 494 of the Commission's report (295 I. C. C. 457), in which 1955 and 1956 earnings per share—1956 earnings being estimated based on results for the first ten months of that year—are compared with earnings per share for the years 1945-1954; and the comparison in the table at page 495 of the same report.

[2]24 Stat. 380 (1887), as amended, 54 Stat. 905 (1940), 63 Stat. 485 (1949); 49 U.S.C. §5(2).

This Court has repeatedly said that the term "public interest," as used in the Interstate Commerce Act, and particularly Section 5(2) thereof, has "direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *N. Y. Central Securities Corp.* v. *United States,* 287 U. S. 12, 25 (1932); *United States* v. *Lowden,* 308 U. S. 225, 230 (1939); *Texas* v. *United States,* 292 U. S. 522, 531 (1934); and *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944).

Determination of when a proposed merger is consistent with the public interest involves the weighing of many considerations by expert appraisers, the Interstate Commerce Commission. As this Court has plainly pointed out in *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944):

> ". . . Resolving these considerations [those involved in a merger case] is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation [motor carriers], but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [citing cases]"

The very thorough and complete report of the Commission in this case shows how extensively it weighed the many pertinent considerations involved to determine whether the proposal would be consistent with the public interest. The Commission concluded:

> ". . . On the whole, we conclude that the merger would enhance the adequacy of service by the merged companies, and would constitute the best use of the facilites." (295 I. C. C. at p. 504)

Its ultimate conclusion, in the words of the statute, that the transactions involved "will be consistent with the public interest" appears shortly thereafter (p. 506).

Contrary to the assertion of the appellants that the two railroads were naturally competitive and not complementary, the Commission found:

> ". . . The physical properties of the two railroads are exceptionally well adapted to integration and unified operations.[3] . . ." (295 I. C. C. at p. 477)

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[3]A map of the two railroads, taken from the record (Ex. H-4, sheet 1, Tr. 147, 349), is reproduced herein as Appendix A. A witness for minority stockholders in opposition to the application, in the course of his testimony, volunteered: "I would like to add, I think the merger is a natural one" (Tr. 1120). Witness Dent, Vice President of the L.& N., testified:

> "In my judgment the merger is a natural one; people who have discussed the merging of railroads for many, many years have always considered the NC&StL to be a part of the L&N System. It just fits into the whole as is demonstrated by the map. There has always been the obvious gap in our system between Nashville and Atlanta, and the NC&StL just fills that gap up. . . .
>
> ". . . As to the eastern part of Tennessee, while we now operate through Knoxville, the NC&StL serves the Chattanooga and Tullahoma areas.

(Footnote continued on following page)

The Commission found also that the merger can be expected to effect savings of approximately $3,243,123 per annum.[4]

The Commission further found:

". . . . Applicants have spent vast sums of money in improvements to their equipment and plant. Additional improvements are planned for the future, particularly with respect to expanded yard facilities at Atlanta, Birmingham and Louisville. Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger. . . ." (295 I. C. C. at p. 504)

The N.C.& St.L. was not an independent railroad. It had been controlled by the L.& N. since 1880, or for more than 75 years.[5] The L.& N. owned approximately 75% of its capital stock.[5]

"Here again the NC&StL complements our system and with the merger with the L&N we will have service to that part of Tennessee. This merger will permit us to more completely serve Tennessee and Alabama and Kentucky, the three principal states in which we now operate." (Tr. 152)

Witness Tilford, President of the L.& N., testified:

"The L&N serves the same general areas of Kentucky, Tennessee, Alabama and Georgia as are served by the NC&StL, and the two roads are complementary to each other. . . ." (Tr. 17)

[4]Pp. 491-492, 493 and 504 of 295 I. C. C. This was based on evidence of minimum savings (Ex. H-11, Part B, sheet 1, Tr. 487-8, 544), doubtful items not having been included (Tr. 170, 365, 403, 490-492, 1603), and was computed in 1955, since which time there has been, as the Court will probably take judicial notice of, another round of price and wage increases which would operate materially to augment these estimated savings.

[5]295 I. C. C. at p. 461.

The L.& N. guaranteed the N.C.& St.L. bonded indebtedness.[6] The L.& N. leased to the N.C.& St. L. an important segment of its line, including that part which enabled the N.C.& St.L. to reach the important city of Memphis,[7] metropolis of Tennessee and gateway to the West.

While the managements of the two railroads had been separate, except that the President of the L.& N. was the Chairman of the Executive Committee of the N.C.& St.L. Board, there had been close co-operation between them for many years.[8] Recent specific instances of coordinated co-operation are reflected in the construction and operation jointly at Nashville of great, modern yard facilities[9] and an adjacent modern freight station[1] for the handling of less-carload freight. A similar though smaller project is in progress at Atlanta.[2] They pooled, with the approval[3] of the Commission, their less-carload freight between Nashville and Memphis.

Railroad mergers have been the subject of exhaustive public studies. Every major study that has been made has treated the L.& N. and N.C.& St.L. as though they naturally belong together. Professor Ripley; of

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[6]295 I. C. C. at p. 464.

[7]295 I. C. C. at p. 462. The portion of the N.C.& St. L. line here referred to is that shown in yellow in Appendix A.

[8]295 I.C.C. at pp. 477, 486 and 504.

[9]Costing approximately $15 million to build (Tr. 19, 39).

[1]Costing nearly $1 million to build (Tr. 39).

[2]Tr. 53-54.

[3]*Pooling, Less than Carload Traffic, Nashville & Memphis*, 291 I. C. C. 79 (1953).

Harvard University, so treated them in his plan,[4] created for the Interstate Commerce Commission, following the original enactment[5] of Section 5(2), *et seq.* The Interstate Commerce Commission so treated them, first in its tentative plan, and later in its adopted plan, made pursuant to that enactment.[6] Other plans which have so treated them were the Prince[7] and Oldham[8] plans.

During Government operation of railroads in World War I, the L.& N. and the N.C.& St.L. were placed under a single Federal Manager.[9]

The record before the Commission shows[10] that railroads are extremely hard-pressed by governmentally-subsidized competition and that the position of the involved railroads, along with that of the railroad industry generally, is steadily becoming more difficult as government continues to spend increasingly large amounts in aid of transportation by airway, waterway,

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[4]Set forth as an appendix to the Commission's report in *Consolidation of Railroads*, 63 I. C. C. 455 (1921), such appendix commencing at page 465 and running through page 660. See page 651 where N.C.& St.L. is proposed as part of A.C.L.-L.& N. system.

[5]In Transportation Act, 1920, 41 Stat. 456 (1920). Please see 295 I. C. C. p. 478.

[6]Please see 63 I. C. C. 455, 460—System No. 11, A.C.L.-L.& N., places L.& N. and N.C.& St.L. together; and 159 I. C. C. 522, 534 (1929)—System No. 8, A.C.L., places L.& N. and N.C.& St.L. together. Please see also 295 I. C. C. at p. 478.

[7]Plan of F. H. Prince, Senate Document No. 119, 73rd Congress, 2d Session, dated January 11, 1934, pages 21-29, "Grand Consolidation Plans."

[8]Plan of John E. Oldham. Congressional hearings in 1926 on H.R. 11212, pages 165-514, and maps.

[9]295 I. C. C. at p. 478.

[10]Tr. 22-31, 175-184, 1212; Ex. H-3, sheets 1-3 (Tr. 25, 289), Ex. H-4, sheets 7-18 (Tr. 147, 349).

and highway, as regulatory and tax laws continue to discriminate against the railroads, and as wage and price levels continue to mount. The result has been great diversion of traffic from the railroads and a steadily shrinking proportion of the total intercity traffic handled by the railroads.[2] After a reference to such facts at pages 467-468 of the Commission's decision (295 I. C. C. 457)—they are further developed at pages 474-476 thereof—the Commission stated:

> "The foregoing reflects how imperative it is for the railroads to do everything in their power to enhance their competitive situation through all possible economies and efficient operations. The proposed merger is designed to accomplish that result." (295 I. C. C. at p. 468)

No railroad in the involved territory, or elsewhere, protested to the Commission against the proposed merger. Two interested railroads, the C.& E.I.[3] and the T.A.& G.,[4] strongly supported it.[5]

No other form of transportation—no motor carrier or water carrier or any other carrier—interposed any objection to it.[6]

Shippers from all over the territory involved came forward, during the course of the hearing before the

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[2]Tr. 28; Ex. H-3, sheet 3 (Tr. 25, 289) Ex. H-4, sheet 12 (Tr. 147, 349).

[3]Chicago & Eastern Illinois Railroad.

[4]Tennessee, Alabama & Georgia Railway Company.

[5]Tr. 960, 1626-1644; 295 I. C. C. at pp. 480-481.

[6]295 I. C. C. at p. 488.

Commission, supporting the merger.[7] The outstanding shipper associations in the involved territory[8] unanimously endorsed it and sent witnesses to testify to this fact.

The only shippers anywhere to oppose the merger were seven shippers located at Nashville,[9] and even at Nashville some shippers supported it.[1]

Finally, the reference cited by appellants to a finding of the Commission of no "immediate or direct" service improvement must be read in connection with the following finding of the Commission:

> ". . .. it is our view that the accompanying savings and improved efficfency of operation necessarily would strengthen the applicants, and render them capable of better service. This we find should, in the long run, result in improvement of the service which they otherwise would be able to render. . ." (295 I. C. C. at p. 504)

Furthermore, the Commission, in the excerpt quoted above and in the language quoted by appellants, used the term "service" in a narrow sense, as referring to such things as expedition and frequency of train movements; for the Commission elsewhere found that other advantages to shippers, which are properly to be called service advantages in a broader sense, would immedi-

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[7]295 I. C. C. at pp. 479-480. Their testimony may be found at Tr. 462-486, 622-646, 661-766, 1492-1516, 1559-1575, 1583-1587. One shipper (Armour & Company) presenting a witness has 42 plants and 49 branch houses located throughout the area served by the L.& N. and N.C.& St.L. (Tr. 764-766).

[8]Tr. 545-546, 649, 656-657.

[9]Tr. 1352-1415, 1469-1472.

[1]295 I. C. C. at p. 479; Tr. 1492-1516, 1559-1575, 1583-1587.

ately accrue. Among the numerous reasons recited by commercial interests in the territory for supporting the proposal are the following:

> ". . . that a much larger car supply would be made available to shippers now located on the lines of the Tennessee Company; that the tracing of cars would be simplified in a single responsibility; and that the industrial development of the tributary territory would be enhanced materially by the merger." (295 I. C. C. at pp. 479-480)

As to the first of these considerations the Commission made this express finding:

> ". . . points now local to the Tennessee Company would have access to a larger territory by single-line railroad service, and would have access to a larger car supply." (295 I. C. C. at p. 469)

The record shows that the L.& N. has the largest car supply of any railroad in the South—approximately 61,000 cars as compared with a car ownership of approximately 7,000 cars by the N.C.& St.L.[2]

The significance of this to the shipper was explained in the testimony of a shipper of clay located on the N.C.& St.L. in West Tennessee, who testified that he had found it necessary to haul his shipments a minimum of ten miles by truck, "in order to get the proper car service"[3]—from the L.& N. The following is from the cross-examination of the witness:

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[2]Tr. 357.
[3]Tr. 694.

"Q. Well, then, why is the necessity of trucking the stuff ten miles?

A. Because on many, many instances we have been out of cars on the NC and the L&N could service us and did service us, so we moved there where we could not in Gleason." (Tr. 709)

As to the second consideration, *i.e.*, relating to the tracing of shipments, a witness, the manager of the Transportation Department of Armour & Company, after testifying that his Company had 42 plants and 49 branch houses[4] in the involved territory, gave as one reason for his support of the merger:

". . . we ship a considerable amount of perishable product[s], carloads. From the time that car leaves the plant until it arrives at its destination, we trace each and every car. We do that for our own benefit. Late arrivals can mean off-condition product. This would mean that we would have one less carrier to contact and based on 20,000 cars a year that is a considerable amount of time that we would save." (Tr. 765)

As to the third consideration mentioned, the Commission found:

"The merger will enable the joint properties to engage in a broader and more intensive effort to develop the territory with respect to the location of industries. If and when the two roads are combined, a greater territory and a greater number of choice sites will be available to industries desiring to locate on the surviving company line.

[4]Tr. 764.

> The general disposition of industries is to locate on a large rather than on small lines, and with the properties merged, a much wider choice of industrial sites will be offered the public. . . ." (295 I. C. C. at p. 477)

Thus it will be seen that the merger promises, as the Commission has found, improvements in service, both immediate and prospective; that neither the record nor the Commission's findings support the proposition that the involved railroads are "naturally competitive rather than complementary"; and the findings of the Commission, in the circumstances of this case, that the proposed merger will be consistent with the public interest by no means justify the conclusion, urged by appellants, that any two connecting carriers should automatically be given permission to merge provided no other carrier objects and no alternative proposal is under consideration.

All of the foregoing considerations lead straight and surely to the conclusion, it is respectfully submitted, that Question 1 is utterly devoid of substantial character.

Question 2 Presents No Substantial Question.

Appellants' Question 2 is whether the record shows the existence of an unlawful combination in violation of the Sherman Act and, if a violation has been shown, whether it is a proper consideration for the Commission in passing on the question of whether its approval should be given to a proposed merger.

A proceeding before the Commission for authority to merge one carrier into another is in no sense a proper place for a determination of the question whether there has been a violation of the Sherman Act. The courts and not the Commission have authority to determine such a question, which can be raised only in a suit instituted by the United States, acting through its district attorneys (15 U.S.C. §4),[5] or in a civil action for treble damages in a United States District Court (15 U.S.C. §15).[6]

The following is from the transcript of the proceeding in the court below:

> "Judge Darr: . . . I would like to ask a question . . . You represent some municipal corporations, don't you?
>
> Mr. Waller: I represent the City of Nashville, Tennessee.
>
> Judge Darr: The City of Nashville, and you say that there have been antitrust violations going on 60 or 70 years?

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[5] 26 Stat. 209 (1890), as amended, 36 Stat. 1167 (1911).

[6] 38 Stat. 731 (1914). The appellants say (p. 24) that "the Sherman Act is a part of the transportation policy of Congress" and that "The Commission itself has recognized that this is true" in *Chesapeake & O. Ry. Co. Purchase*, 271 I. C. C. 5. The cited case concerned, not a merger, but interlocking directorates, and not the Sherman Act but Section 7 of the Clayton Act, concerning which the Commission is given specific responsibilities by Section 11 of the Clayton Act. The Commission pointed out that if a merger were sought (as is sought here), entirely different considerations would govern, saying (pp. 41-42):

> "If the applicants are firmly of the opinion that the proposed association will result in the benefits to the carriers and to the public which they contend we should find on the showing that they have made in this proceeding, there is no reason why they should not file an application for some form of association under section 5(2) of the act."

Mr. Waller: Yes, sir.

Judge Darr: Has your client taken any interest in seeing that these violations were abated?

Mr. Waller: I think that is a matter—

Judge Darr: (interrupting) Has it taken any interest on up to this merger?

Mr. Waller: I think that is a matter for the Department of Justice, Your Honor.

Judge Darr: Not necessarily. They can be civil.

Mr. Waller: Only, I think, Your Honor, on a civil case for damages. I don't think that anyone other than the Department of Justice could bring a criminal action or an equity—

Judge Darr: (interrupting) Well, have they taken any interest in interesting the Department of Justice in it?

Mr. Waller: Now, I would like to talk a little bit about the Department of Justice if I may.

Judge Darr: All right, you can dodge the question if you want to. Go ahead.

Mr. Waller: I can't answer for the Department of Justice except that I want—

Judge Darr: (interrupting) I was asking about your client. Has your client taken any interest to abate what you say was a violation of the antitrust laws for 60 or 70 years?

Mr. Waller: I don't know, Your Honor, whether it has or not.

Judge Darr: Right here in the City of Nashville?

Mr. Waller: I don't know whether it has or not. I am special counsel for the City, and if the City of Nashville has ever appealed to the De-

partment of Justice in connection with this case, I don't know it. I do think that my associate—

Judge Darr: (interrupting) I don't know that that is controlling, but I just wondered why, if it has been going on here so long, they haven't done something about it.

Mr. Waller: I think my associate in this case, Mr. La Roe who is now dead, did write a letter to the Department of Justice when this merger case came up.

Judge Darr: I mean before the merger.

Mr. Waller: So far as I know, there has been no action taken by the Department of Justice or by anybody else.

Judge Darr: The City of Nashville has not taken any interest in going to the Antitrust Division of the Department to say that these Railroads are violating the antitrust law?

Mr. Waller: Not so far as I know.

Judge Darr: All right." (R. 29-31)[7]

Counsel for the Department of Justice appeared in the court below and made the following statement:

"Mr. McConnell: May it please the Court, I am from the Department of Justice, and I do not have anything to add to what has been said today.

"I would just like to make this brief statement because it has been referred to: Of course, the City of Nashville and others of the plaintiffs did represent to the Department of Justice, to the Antitrust Division, the Assistant Attorney General, Antitrust, that this merger would affect com-

[7]References here and hereinafter to numbers in parentheses preceded by the letter "R." are to pages of the transcript of the proceedings before the three-judge court.

petition and that it is contrary to the antitrust policy.

"The matter was gone into thoroughly, and the Assistant Attorney General, Antitrust, wrote a letter to the Chairman of the Interstate Commerce Commission, calling his attention to those antitrust implications in the case and asked the Commission to bear them in mind very carefully. When the report came out, it was perfectly evident that the Commission did throughout consider those aspects of the case.

"With respect to the other features of the thing which relate to the antitrust laws, the fact that allegations are here made that for a number of years in the past there have been statutory violations, in that connection, I would really like to make one comment. An antitrust case, as Your Honors so well know, is a very complicated thing, and involves tremendous issues of law and fact. It takes a long time to go into such an inquiry, and a collateral inquiry of that sort could not be made in this case by the Commission itself. It did consider those aspects of the matter.

"It has been common knowledge for 75 years that there was this close working arrangement between the two roads. It's interesting that during those 75 years there have been vigorous antitrust programs a lot of times directed directly at the railroads. President Roosevelt, for example, that was one of his prime programs, and you have had men like Justice Jackson and others there. The only thing that I can say is that no proceeding was ever brought.

"In any event, we reviewed this record carefully, with extreme care, and under all the cir-

cumstances of the case, it is our feeling that the Commission was acting well within its statutory power and gave unusually close attention to all aspects of this matter, and we think the order is valid and that the action should be dismissed." (R. 160-161)

The specific wording of the Interstate Commerce Act, and the specific rulings of this Court, provide even more precise answers to the contention of the appellants that the Commission should have made a determination that there has been a violation of the Sherman Act and that, having so found, it should have weighed this consideration against approval of the merger.

Paragraph (11) of Section 5,[8] under which section the Commission proceeded in this case, provides in material part:

> "The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws . . ."

In *McLean Trucking Co.* v. *United States, supra,* it was held that this plain language of paragraph (11) of Section 5 of the Act permits the Commission to approve a merger which would, if not approved by the Commission with the consonant exemption under the Act, violate the anti-trust laws, and *United States* v.

[8] 54 Stat. 908 (1940); 49 U.S.C. §5(11).

Southern Pacific Co., 259 U. S. 214 (1922), and later developments thereof, to be detailed hereinafter, stand for the proposition that the similar provision of the Act as it then read rendered unimportant to a Commission decision a past violation of the antitrust laws.

In the *McLean Trucking Co.* case, this Court had before it, in a merger case, the same sort of question which the City raises here, namely, that the Commission applied an erroneous standard in determining the propriety of the merger, the alleged error being that it failed to give due weight to the antitrust laws. The Court thus stated the contention:

> "The chief attack on the orders is that the Commission improperly construed the standards by which Congress intended it to determine the propriety of a consolidation; and the burden of this complaint is that it did so 'by failing to consider and give due weight to the anti-trust and other laws of the United States.' The argument seems to be that the merger, notwithstanding the Commission's approval, violates the Sherman Act; hence the Commission is without power to approve the merger. This presupposes that Congress did not intend, by enacting the specific exemption of Section 5(11), to give the Commission leeway to approve any merger which, but for the exemption and the Commission's approval, would run afoul of the antitrust laws. . . . ." (321 U. S. 67, 77-78)

The Court then (321 U. S. at p. 79) rejected it in this sweeping language:

". . . It is not for this Court, or any other, to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action. The argument in its full sweep therefore must be rejected. . . ."

The Court thereafter very pointedly said (321 U. S. at p. 85) "that the Commission is *not to measure proposals for all-rail or all-motor consolidations by the standards of the antitrust laws.*" (Italics ours)

Continuing, it said of the action of Congress:

". . . And *in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility.* It in terms relieved participants in appropriate mergers from the requirements of those laws. Sec. 5(11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. . . ." (321 U. S. at p. 85) (Italics ours)

Summarizing the duty of the Commission in appraising the effect of a merger on competition the Court said:

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation,

lower costs, etc., to determine whether the consolidation will 'assist in effectuating the over-all transportation policy.'" (321 U. S. at p. 87)

Here the Commission gave much consideration to Nashville's contentions[9] and ruled:

"Necessarily the effect of the transaction upon competition constitutes an important factor to be considered, and the record establishes beyond a doubt that the proposed merger will reduce competition throughout the affected area. However, this fact does not necessarily preclude its approval. Our task is to 'estimate the scope and appraise the effects of the curtailment of competition which will result . . . and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.' *McLean Trucking Co.* v. *United States*, 321 U. S. 67. The record makes clear that, except for the area served by Nashville, this is not a case involving service through an area which in general suffers from a paucity of through competitive routes. . . ." (295 I. C. C. at p. 503)

And:

". . . We conclude from the record that the merger would strengthen the resulting system and make it more capable of rendering effective competition with the other railroads serving the South Atlantic coastal area. We find that the reduction in competition resulting from the merger would be consistent with the public interest." (295 I. C. C. at p. 488)

[9] 295 I. C. C. at pp. 481-482 and 503.

Not only did the Commission consider the effect of the proposed merger upon the competitive situation actually existing between the two railroads (pp. 485-486), but it also considered the effect of the merger upon competition if they were "truly competitive," saying:

> ". . . But, even approaching this problem from the standpoint that the applicants are truly competitive, it is our view and we find that for the reasons herein set forth the advantages to the public interest from the merger outweigh the disadvantage to the single locality of Nashville . . ." (295 I. C. C. at p. 504)

The antitrust objections were pressed with far greater vigor in the *McLean* case than they have been or could be in this one. Yet the Commission's action approving the merger there involved was held to be proper both by the District Court and by the Supreme Court.

In the *McLean* case, the Antitrust Division of the Department of Justice appeared before the Commission and opposed the merger.[1] When the Commission approved the merger in the *McLean* case and an action was brought to set aside the Commission's order, the United States confessed error.[2] As a result of the merger approved in the *McLean* case, Associated Transport, Inc., became the largest motor carrier in the United States in terms of estimated revenue.[3] In

[1] 321 U. S. at p. 69.
[2] *Ibid.*
[3] 321 U. S. at p. 71.

this case, the Commission found that the L.& N. ranked fourteenth among railroads in terms of gross revenues and that by reason of the merger it would advance only one rank, to thirteenth place, still below its two principal competitors, the Illinois Central and the Southern Railway.[4]

The case of *United States* v. *Southern Pacific Co., supra,* and subsequent developments before the Commission[5] and in the District Court,[6] go a step beyond the *McLean* case and hold that even where there has been a direct judicial *determination* that a violation of the antitrust laws has existed—as distinguished from the mere collateral *allegation* of a violation as in the *McLean* case and in this one—subsequent approval of the condemned transaction by the Commission under Section 5(2) of the Interstate Commerce Act grants relief from the antitrust laws.

In that case this Court found that the Southern Pacific, by acquiring control of the Central Pacific, had violated the Sherman Act. The Court directed that a decree be entered terminating the existing control and separating the two properties. Following issuance of the mandate of this Court, the Southern Pacific filed an application with the Commission for authority under Section 5(2) of the Interstate Commerce Act to acquire control of the Central Pacific despite the decree of this Court. The application was

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[4]295 I. C. C. at pp. 462-463.

[5]*Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508 (1923).

[6]*United States* v. *Southern Pacific Co.*, 290 Fed. 443 (1923).

approved by the Commission. The Commission said[1] that "[w]e must recognize as settled" that the acquisition of control of the Central Pacific by the Southern Pacific "was in violation of the Sherman Act." It said, further, that "if that were the only question before us, we would not have any function to perform" inasmuch as "we must recognize the finality of a court decree upon the questions with which it deals."

Continuing, the Commission said:

> ". . . There is nothing in section 5, however, indicating that the Congress intended that we should refuse to accept jurisdiction upon the ground, solely, that a proposed acquisition of control would violate the Sherman law. . . . When by our order based upon broad considerations of the public interest we in effect grant relief against antitrust laws, and other restraints and prohibitions, by law, we are exercising a power which the statute gives to us alone. Evidence as to public benefits to be derived from common control of competing carriers, which would be immaterial in a prosecution under the Sherman Act, might be entirely pertinent in a proceeding before us under paragraph (2). . . ." (76 I. C. C. at p. 516)

The Commission found that operation of the Central Pacific as a separate carrier would "disrupt existing routes and service" (p. 518); result in "increased cost of operation and duplication of capital investment" and "increased cost of operation" (p. 519); and render it doubtful that the Central Pacific,

[1] 76 I. C. C. at p. 515.

independently operated, "would have the earning capacity, credit, and financial ability" to meet its fixed charges and acquire new equipment and make improvements (p. 519). The Commission, therefore, approved the application.

The three-judge court sitting as the District Court for the District of Utah approved the Commission's action, saying:

> ". . . The prior unlawful control with which the mandatory requirements of the decision of the Supreme Court were intended to deal has now been succeeded by a situation and relation between the two railways which is lawful, and the executory and directory provisions of said mandate have thus been satisfied or rendered inoperative." (290 Fed. at p. 450)

Appellants incorrectly assert (p. 19) that the contention of the involved railroads has been that the alleged destruction of competition in 1880 makes lawful a continuing destruction of competition since then. They have never advanced any such contention. Their contentions have consistently been, as we have stated them herein, that it is not the function of the Commission to determine whether there has been a violation of the Sherman Act, that no Sherman Act violation has been shown because it could only be shown through a judicial determination by a Federal Court in a case presenting such an issue, and that appellants have proceeded on the wholly erroneous premise that a Sherman Act violation can be *assumed* by the Commission or by a court reviewing an order

of the Commission. Appellants do assume it—by their assertion that there has been a continuing violation of the Sherman Act—but such assumption manifestly will not make it a fact.

Clearly, then, there is no substance to appellants' Question 2. This may be seen further from another point of view.

The appellants concede (p. 22) that the Commission has power to approve, as consistent with the public interest, the control of one railroad by another, even though such control would eliminate competition; but they would distinguish the Commission's power in control cases from its power where a merger is involved. What appellants do not seem to realize is that the same section of the Interstate Commerce Act[8] which authorizes the Commission to approve the acquisition of control likewise authorizes it to approve a merger of two carriers.

The appellants likewise concede (pp. 25-26) that the Commission gave consideration to the effect of the merger upon competition. While they seek to minimize the extent of the Commission's consideration of that subject, the fact is that the Commission gave it full consideration, saying (295 I. C. C. at p. 503):

> "Necessarily the effect of the transaction upon competition constitutes an important factor to be considered. . . ."

Thus, the effect of the concessions of the appellants is also to demonstrate that there is no substance to Question 2.

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[8] 54 Stat. 905 (1940); 49 U.S.C. §5(2).

Question 3 Presents No Substantial Question.

Question 3 presented by appellants is a double-barreled affair. It is in fact two questions, the first being whether Section 5(2)(c) was correctly interpreted by the Commission and the second whether the District Court should have dismissed the action in view of the fact that its approval was stated as being "upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15" (p. 14, typewritten copy of decision; p. 13a, Appendix A, Appellants' Jurisdictional Statement).

The two questions are equally without substantiality.

As to the former, no interpretation of Section 5(2)(c) by the Commission is cited, and no interpretation thereof appears in the Commission's report. What appellants really mean by their complaint about interpretation appears when they say (p. 28) "the Commission erred in not following its own precedent," the precedent referred to being the decision of the Commission in *Fort Worth & D.C. Ry. Co. Lease*, 247

I. C. C. 119 (1941), which represents, they say (p. 28), a correct application of Section 5(2)(c).

How thoroughly devoid of merit this proposition is may be seen in the fact that it is well settled that a lack of consistency in the decisions of the Commission is no ground for attack; and in the fact that the cited decision, although properly distinguishable, and properly distinguished by the Commission, from the instant case, has never been followed by the Commission as a precedent and is not a reliable precedent being, among other things, at variance with the legislative history of Section 5(2)(f).

As long as the Commission's decision in the instant case is correct it is no valid objection to it that it is at variance with a decision in a prior case. This point has often been squarely decided, a comparatively recent decision being that of a three-judge court for the District of Massachusetts in *M. & M. Transportation Co. v. United States*, 128 F. Supp. 296 (1955), which was affirmed at 350 U. S. 857 (1955).

In that case the Commission, acting under Section 5(2) of the Interstate Commerce Act, had authorized one motor carrier to acquire the operating rights of another. Two competing motor carriers attacked the order on the ground, among others, that it was contrary to prior Commission decisions in other cases. The petitioners especially relied upon *Pacific Intermountain Express Co.—Control and Purchase*, 57 M. C. C. 341 (1950). The District Court first pointed out that on rehearing and in a subsequent case, the Commission

had "limited the application of the Pacific Intermountain Express decision." It then said:

> ". . . Third, even if the latter case had not been limited by later decisions, the asserted inconsistency between the instant result and that in the Pacific Intermountain Express case would not require setting aside the Commission order. The courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. [Citing cases] . . . Where, as in the instant case, the findings are on their face adequate and explain the basis for decision, there is no occasion to examine consistency with prior decisions. . . ." (128 F. Supp. at p. 301)

Referring to the *Fort Worth & D.C. Ry. Co. Lease* case, the Commission, in its decision in the instant case. said:

> ". . . The cited case involved a lease of the Fort Worth & Denver City Railway Company by The Colorado and Southern Railway Company. It differed from the instant case in that initial control was to be attained by the lease rather than a merger of properties which have been controlled by the dominant company, through stock ownership, for more than 75 years. . . ." (295 I. C. C. at p. 501.)

This statement is precisely correct and expresses a very proper distinction between the two cases. But, as indicated, what the appellants complain of is that *Fort Worth* decision was not accepted as controlling this case.

So far as we have been able to find, the *Fort Worth* case is the only case ever decided by the Commission where the effect of a proposed acquisition on the employees involved appears to have been a controlling consideration in the denial of an application under Section 5(2) of the Interstate Commerce Act. That decision has never been followed, or cited as authority, in any other case.

In deciding that case the Commissioners were sharply divided, the distinguished Commissioner Eastman having vigorously dissented. Three other Commissioners also dissented. Only four joined in the expression of the majority, two others merely registering concurrence in the result.

The facts there were widely different from those in this case, in many respects. This is shown in detail in applicants' Reply to Exceptions.[9] Among other things, the Commission there said that approval of the proposed acquisition might be expected to result in both roads involved being operated at a loss (247 I. C. C. at p. 127), which could not be, and was not found to be, the case here. Again, it was found there that the contemplated savings from the proposed action were doubtful (p. 127), whereas here there are express findings[1] that large savings can be realized. In that case there was no area-wide support for the acquisition, whereas here there was.[2]

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[9]Pp. 68-70, this reply being appended as an exhibit to our Answer to the Complaint.

[1]295 I. C. C. at pp. 491-492, 493, 504.

[2]295 I. C. C. at pp. 479-480.

The rule that has been employed in other cases since the decision in the *Fort Worth* case is that expressed by the Commission in *St. Louis S.W. Ry. Co. of Texas Lease,* 290 I. C. C. 205, 213-214 (1953), as follows:

> "At the hearing, representatives of railroad labor organizations objected generally to the proposed lease because of the adverse effect on employees which would result by the elimination of positions of certain employees and the change in the place of work which will be required of numerous other employees. If such considerations alone would warrant rejection of a proposed unification of railroad properties under section 5(2) of the act, approval could be given only in those instances in which no savings would be effected. To permit railroad unifications and at the same time avoid or alleviate hardships that otherwise would be inflicted upon employees, there was enacted section 5(2)(f) of the act. . . ."

The history of Section 5(2)(f) was reviewed by this Court in *Railway Labor Assn.* v. *United States,* 339 U. S. 142, 146-153 (1950). Therein it was said:

> "The second sentence of 5(2)(f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:
>
> > '*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.[3]

[3]A footnote at this point cites 84 Cong. Rec. Pt. 9, 9882 (1939).

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

"With the Harrington Amendment in it the bill went to conference. . . ." (339 U. S., pp. 150-151)

By a footnote at this point it was explained that while the bill was in conference the Legislative Committee of the Interstate Commerce Commission advised the Congress as follows:

"'As for the [Harrington] proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees.' Interstate Commerce Commission Report on S. 2009, Omnibus Transportation Legislation, p. 67 (76th Cong., 3d Sess., House Committee Print), transmitted January 29, 1940."

Following such advice the bill was changed to the present form of Section 5(2)(f).[4]

It is plain that the purpose of Congress was that the Commission should accord protection to adversely affected employees by the imposition of just and reasonable conditions but not disapprove consolidations by reason of adverse effect on employees.

This does not mean that the Commission is not, in passing upon a railroad merger proposal, to consider "the interest of the carrier employees affected" as it is required to do by Section 5(2)(c),[5] but the action of

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[4]It reading:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (54 Stat. 906 1940); 49 U. S. C. §5(2)(f))

[5]It reading:

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public

(Footnote continued on following page)

Congress made clear beyond peradventure that that requirement in Section 5(2)(c) was not to be regarded as an overriding and decisive consideration.

The Commission in this case manifested great concern for the affected employees and after weighing both Section 5(2)(c) and Section 5(2)(f),* dealt with such employees most generously, the employee-protection provisions being properly described by it as follows:

> "It is generally conceded that the conditions recommended by the examiner, and which we hereby adopt, are more favorable than any heretofore imposed in merger cases. . . ." (295 I. C. C. at p. 502)

These conditions provide a minimum of four years' profection to a dismissed employee who has a service record as long as four years, *i. e.*, for at least four years from the effective date of the Commission's order he is assured of being in no worse position, paywise, than he was at that time. The issuance of a temporary restraining order by Judge Martin in this case, which was in effect from April 8 to June 20, 1957, and the issuance of a new order by the Commission to become effective August 14, 1957, operated, as a practical matter, to extend that period of protection.

As to those employees who are required to move, their moving expenses are to be borne by the L. & N.,

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interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (54 Stat. 906 (1940); 49 U.S.C. §5(2)(c))

*295 I. C. C. at pp. 500-503.

and they are protected against loss from the sale of a home or from cancellation of a residential lease.[7]

And there are other prescribed fringe benefits of substantial value.[8]

The argument of appellants on this subject comes down to just this: that the merger should have been disapproved because it would result in less employment—which means of course that the law on railroad mergers should be so administered by the Interstate Commerce Commission as to require applicants to retain indefinitely unneeded employees in unneeded jobs thereby preventing the railroads from effecting needed economies.

The Interstate Commerce Act as a whole, commencing with the declaration of the national transportation policy[9] which enjoins upon the Commission administration of all the provisions of the Act in a manner calculated to produce, among other things, "economical

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[7]Furthermore, there are job opportunities incident to becoming a part of a larger and financially stronger and more stable railroad organization. This was recognized and declared by the Commission in *Florida East Coast Ry. Co. Reorganization*, 267 I. C. C. 295, 326 (1947).

[8]"No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained." *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, 199 (1944).

Adopted by the Commission in this case at 295 I. C. C. at p. 502.

[9]54 Stat. 899 (1940); 49 U.S.C., preceding §1.

and efficient service," cries out against any such construction of Section 5(2).

The result of what is sought would, of course, only be to handicap the railroads in their efforts to compete against the most difficult kind of competition, government-aided competition, and in the long run could only hurt, rather than help, railroad employment.

The national transportation policy calls for the administration of the Interstate Commerce Act so as, among other things, to "encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by . . . rail . . ."

Turning to the question whether the lower court erred in not dismissing the action because it included in its decision a statement to the effect that the rights of the N.C.& St.L. employees should be protected equally with those of L.& N. employees, we quote as follows the court's statement referred to:

> "The approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved

herein, disclosed in finding of fact Number 15." (p. 14, typewritten copy of decision; p. 13A, Appendix A, Appellants' Jurisdictional Statement)

Finding of Fact No. 15, therein referred to, reads as follows:

"15. Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is without power, in connection with a reorganization, to tell carriers who shall or shall not be laid off as a result of the merger. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers as limited by their collective bargaining agreements. The attorney stated, moreover, that the Commission merely identifies positions which would be affected and does not undertake to state what individuals would be affected.

"The attorney for the Louisville and Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company stated that, in the merger agreement between the railroads, it is expressly provided that the Louisville and Nashville will assume any and all obligations and contracts of the Nashville, Chattanooga & St. Louis Railway Company, *including its negotiated union bargaining agreements.*" (pp. 8-9, typewritten copy of decision; p. 13a of Appendix A, Appellants' Jurisdictional Statement; Italics ours)

As stated in this finding, there was a lengthy colloquy on the question whether the Commission had undertaken to hold that only N.C.& St.L. employees —and not L.& N. employees—would be adversely affected by the merger. The sentence in the Commission's report which gave rise to the question is the following:

> "*Employees.*—According to testimony of the applicants, *jobs* of approximately 550 employees of the Nashville, Chattanooga & St. Louis would be abolished, and an additional 289 would be transferred, making a total of 839 employees affected by the proposed merger. . . ." (295 I. C. C. at p. 500; Italics ours)

It will be seen that the statement refers to "jobs" that no longer will be required; it does not say that only N.C.& St.L. employees will be adversely affected, *i. e.*, that in the merging process such employees will have no right to places in the merged company. The Commission could not have said such a thing for, as its counsel stated in the course of the proceeding before the court below:

> "Mr. Ginnane: As I read the statute and the decisions, the Commission's power and responsibility is limited to specifying the protection for those who are laid off, and that the choice as to who is to be laid off is left by the law to the managerial discretion of the carriers as limited by their collective bargaining agreements.
>
> Judge Martin: That is what we have thought all through, the three of us. We conferred dur-

ing the recess. Now, here is the point, did the Commission overstep its power that you have said is limited in the writing of this order or in the statement that it made. That's what we were querying about.

Mr. Ginnane: I am completely satisfied that the Commission was just identifying the positions which would be affected and not purporting to—

Judge Martin: (interrupting) To rule on the question of which you say it had no—

Mr. Ginnane: (interrupting) (continuing)—say which individuals should retain employment and under what conditions. It seems clear to me that that is subject to the managerial discretion of the carriers as limited by their collective bargaining agreement.

Judge Martin: All right. I think that clears it up, don't you?

Judge Shelbourne: Yes." (R. 194-195)

Immediately preceding these statements was the following:

"Judge Darr: . . . As I understand, the railroad counsel in open court concedes that this order does not arbitrarily say that all persons who may be employed in the merged railroad who will be discharged will be N&C employees?

Mr. Grubbs: Absolutely, Your Honor.

Mr. Harwood:[1] It does not say that they won't be from the N&C either, Your Honor.

Judge Darr: Well, that's putting it two ways.

Judge Martin: Is there any statement that any counsel representing the L&N would like to

[1]Counsel for N.C.& St.L. Railway Employees Job Protection Association.

make about this matter or do you think that you have given us all that we need to know about it?

Mr. Keeble: If Your Honor please, I think so. It is the position of the L&N that this order of the Commission does not attempt or purport to provide that all of the dismissed or displaced employees will come from the NC&StL. That matter will be worked out under the provisions of the protective conditions set forth in the order, and also in addition to that, of course, these men represented by Mr. Harwood will have the advantage of the representation of their bargaining agent who had a representative here throughout this hearing. Nothing is being put over on them at all.

Judge Martin: May I hear from the ICC counsel?

Mr. Ginnane: May it please the Court, I am quite definitely of the opinion that the Commission is without any power in connection with the reorganization to tell the carriers who shall or who shall not be laid off as a result of the merger.

Judge Darr: That's right.

Judge Martin: That's what we thought." (R. 193-194)

It is clear that the Commission did not undertake to do otherwise, as it concluded:

". . . Under the circumstances, we will impose the same conditions for the protection of railway employees who may be adversely affected as were set forth in *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271. . . ." (295 I. C. C. at p. 501)

And:

> "It is generally conceded that the conditions recommended by the examiner, and which we hereby adopt, are more favorable than any heretofore imposed in merger cases. In view of this fact, we are convinced that any disputes as to particular employees or group of employees affected by actions of the applicants in consummating the merger may be resolved by following the procedure set forth in condition No. 8 of the conditions prescribed in *Oklahoma Ry. Co. Trustee Abandonment*, 257 I. C. C. 177, which are incorporated in the New Orleans passenger terminal conditions previously prescribed herein. That condition provides for consideration and determination by an arbitration committee of questions regarding the eligibility for protection of persons or groups elsewhere described in the conditions. . . ." (295 I. C. C. at p. 502)

In the light of these considerations, it is perfectly plain that the court below was not finding any fault with what the Commission had done but was undertaking merely to make clear and certain that its interpretation of the Commission's decision was that it did not authorize or direct any discrimination against N.C.& St.L. employees and that it was with that understanding or interpretation that the Commission's order was approved.

Certainly there is nothing here to suggest that the court below erred in dismissing the action, and certainly there is no appearance of a substantial question for determination by this court.

Question 4 Presents No Substantial Question and Improperly Raises Questions Not Raised Below.

This question, like the one immediately preceding it, is not one question. Nor is it, like the immediately preceding one, two questions. It is in fact a cluster of questions, all, however, relating to alleged procedural errors committed by the Commission. None of them presents a substantial question.

The first of this series of questions is whether the Commission erred in not issuing a *subpoena duces tecum* requested by appellants. This question was not raised in the complaint nor considered below and cannot be raised at this time. In *United States* v. *Atkinson*, 297 U. S. 157, 159 (1936), this Court said:

> ". . . examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal."

This is the rule consistently followed: *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U. S. 191 (1909); *Weade* v. *Dichmann, Wright & Pugh Inc.*, 337 U. S. 801, 808 (1949); *National L.R.B.* v. *Truitt Manufacturing Co.*, 351 U. S. 149, 151 (1956).

Blended with appellants' presentation in dealing with this question is a discussion of claimed error on the part of the Commission which was raised below and ruled on as follows:

> ". . . this court holding . . . that the action of the Commission did not constitute prejudicial error:

"(a) The City of Nashville urged that the Commission should require the applicant railroads to produce certain preliminary reports concerning the merger which were made by a freight traffic manager of the Louisville and Nashville Railroad Company. The Commission stated that, although these reports were not produced by the applicants, 'extensive testimony with respect thereto was presented by interveners in opposition through former vice-president in charge of traffic for the Tennessee Company.'" (p. 11, typewritten copy of decision; pp. 10a-11a, Appendix A, Appellants' Jurisdictional Statement)

As showing how unsubstantial the attack on this ruling is, we point out that what appellants term "the original Kentucky Company traffic study" has never before been so characterized and was in fact only a preliminary, intra-departmental report; that applicants were not asked to produce this particular report but rather were requested to produce all studies and memoranda, traffic and otherwise,[2] prepared prior to the filing of the application with the Commission. Such request, made after the hearing before the Commission had gotten under way, was wholly unreasonable. It was in effect that the hearing be interrupted and applicants be required to proceed to assemble and bring forward all preliminary investigations and papers for placement in the hands of counsel for the City of Nashville. For applicants to have been required to review all of their many files, from the four corners of their properties, to strip them of such ma-

[2]Tr. 228-236.

terial and bring it forward and place it in the hands of the City's counsel would have been, as was stated on the record, "a mountainous undertaking."[3]

Consideration of the merger had gone on for many years[4] and it had been the subject of "almost . . . continuous study"[5] "over a period of years,"[6] and "intensive study" in the years 1952-1954,[7] "innumerable memoranda" having been "exchanged on the subject."[8] What the appellee did was to bring forward all the complete, final studies of every department of the railroad and present them through its chief officers.[9] In addition, upon the request of the City of Nashville, appellee (Tr. 236-237) presented the report which its President had presented to its Board of Directors, in response to the latter's request (Tr. 20) upon its management for a plan for merging the two properties.[1] Certainly no more could reasonably have been required. These witnesses were cross-examined at great length by counsel for the City and others.

The preliminary reports, called "original" study by appellants, were made by a freight traffic manager of the L.& N., a subordinate of the traffic Vice Presi-

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[3]Tr. 231.
[4]Tr. 19, 227.
[5]Tr. 233.
[6]*Ibid.*
[7]Tr. 20.
[8]Tr. 235.
[9]Appellee's counsel explained at the time:

"We bring forward to you today everything that is right up to date on this subject. We have witnesses here who can be examined at length and who will present the very latest studies and most complete studies that are available." (Tr. 231)

[1]Ex. H-5 (Tr. 236-237, 237).

dent. The final report was made by the traffic Vice President, Mr. Dent.[2] Mr. Dent was produced as a witness and presented extensive testimony,[3] including his elaborate study of the probable effect of the merger from the standpoint of the Traffic Department of the L.& N.,[4] and was cross-examined at great length.[5]

Appellants, while complaining of appellee's failure to produce such reports, quite obviously had possession of copies of them, or access to them (and therefore might themselves have placed them in the record had they really desired them to be a part of the record), because they did place the results contained therein in the record through one of their own witnesses, as appears in the Commission's report, as follows:

> ". . . The studies and reports made by the freight traffic manager of the Kentucky company, upon which the interveners in opposition so heavily rely, were not included as part of the applicants' case, but extensive testimony with respect thereto was presented by interveners in opposition through the former vice president in charge of traffic for the Tennessee company. Such studies, which dealt solely with traffic matters, showed a variance from a net traffic department loss from the merger of approximately $601,408 after Federal income taxes, contained in the first report, to a traffic department saving of $168,107 before income taxes, as contained in the third report. . . . ." (295 I. C. C. at p. 505)

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[2]Tr. 233 and 1622.

[3]Covering 202 pages of the transcript (Tr. 145-197, 295-349, 1587-1626, 1651-1704).

[4]Ex. H-4 (Tr. 147, 349).

[5]Covering 116 pages of the transcript (Tr. 295-349, 1603-1626, 1667-1703).

Appellants next (p. 33) launch into a discussion of alleged restriction of cross-examination. The Complaint raises no issue as to alleged restriction of cross-examination and the issue is therefore not properly before this Court.

What is referred to as a restriction of cross-examination was in fact a refusal on the part of the Examiner to require appellee, while a witness was on the stand and being cross-examined, to produce certain figures, showing the number of employees in the L.& N. Accounting Department in 1947, which were not readily at hand, the hearing being in Washington and the witness's office being in Louisville.

Counsel for the City of Nashville asserted at the time that he wanted these figures for comparison with figures of record showing current employment in the L.& N. Accounting Department so that he might determine whether the Department was overstaffed. Although the witness did not have the figures available, he stood ready to be cross-examined at any length on whether his Department was overstaffed.[6] Counsel for Nashville, however, refused to cross-examine him on the subject.[6]

The unwillingness of the Examiner to require the working-up and production of such figures was sustained by the Commission, and is complained of in the Complaint (Par. 7(c), pp. 8, 9), the charge being that failure to require such production constituted prejudicial error rather than that it was a denial or restriction of cross-examination.

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[6]Tr. 508.

As showing that even if the figures had been available they could have been of no probative value, the following is quoted from the record:

> "The Witness: Since that time, various states have enacted laws requiring deduction of income taxes from employees, there have been numerous other changes in accounting rules and regulations [so] that a comparison of 1947 employment and 1955 employment is absolutely worthless when you come to accounting." (Tr. 509)

Manifestly, the court below was entirely right, in such circumstances, in holding that no prejudicial error was committed by the Commission. (Conclusion of Law No. 7, pp. 11-12, typewritten copy of decision; pp. 10a-12a, Appendix A, Appellants' Jurisdictional Statement)

The next alleged error (p. 34) is also denominated a restriction on cross-examination, but it was not so referred to in the Complaint, it being there referred to (Par. 7(d), pp. 9, 10) as an error by the Examiner, sustained by the Commission, in refusing to require appellee to work up and produce for the record certain figures showing the amount of traffic interchanged between the L.& N. and the N.C.& St.L. at Nashville. The request, which was not granted, was for interchange figures for the years 1951 and 1952.[7]

The information was sought by counsel for the City of Nashville in connection with the so-called "solicitation agreement" described at pages 482-485 of the Commission's report.

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[7]Tr. 222-223.

Appellee had previously been requested and had agreed to provide the number of revenue cars moving into and out of Nashville by the L.& N. and the N.C.& St.L. during the years 1953 and 1954,[8] and had agreed further to provide the figures as to traffic interchanged at Nashville in 1953 and 1954.[9]

Appellant City of Nashville, however, has asserted that it wanted to develop the effect of an amendment made in May, 1951, on the movement of traffic via Nashville and the N.C.& St.L. Aside from the fact that it is very questionable whether such information would be at all relevant to the question whether the proposed merger was consistent with the public interest, the fact is that the figures requested could not possibly have shown what appellants say they wanted to develop, as was explained to the Commission.[1]

Appellants attack the following statement of the Commission:

> ". . . As in all applications filed under section 5(2) of the act, the burden of proof is on the applicants herein, and it is their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application. The information called for in our order of October 14, 1940, with respect to such applications, may be used to guide the applicants in the matter. The applicants herein have complied with that order, and have submitted ample evidence suf-

[8]Tr. 201.

[9]Tr. 222.

[1]At pp. 218-221 of appellee's Reply to Exceptions. Please see also Tr. 1693.

ficient and adequate to sustain the material allegations contained in the application. . . ." (295 I. C. C. at p. 505)

It is surely true that an applicant, in assuming the burden of proof, proceeds in the presentation of its evidence at its own risk. The cited order of the Commission specifies the information which the Commission regards as necessary when an application is filed under Section 5(2) of the Interstate Commerce Act. The appellee not only supplied all the facts required therein—these were set forth in the application, dated January 26, 1955 (filed with the Commission on January 28, 1955)—which facts are adequate to make out a *prima facie* case for applicants (the design of the rules being that unless there is some protest the application can be decided based on the information supplied in such application), but, *in addition,* presented 38 witnesses, including its President, its traffic Vice President, its operating Vice President, its financial Vice President, its Comptroller, its Director of Personnel, its General Industrial Agent, and the Comptroller of the N.C.& St.L. and 25 witnesses representing many hundreds of affected shippers.

These witnesses dealt with every conceivable phase of the proposed merger, and their testimony and cross-examination comprise 1,221 pages of the transcript of testimony. They also presented 49 exhibits (in addition to 23 exhibits filed with the application), many of them very elaborate ones, constituting, appellee believes, one of the most complete presentations ever made before the Commission in such a case.

What appellants complain of in fact is that the Examiner and the Commission did not require appellee to furnish all the minutiae that the parties opposing the application requested. The most onerous demands or requests to supply material were made upon appellee by such opposing parties. Appellee was willing to supply, and did supply, for the record, much of the material thereby sought—Appendix B hereto lists numerous examples of requests made by those opposing the application—but it took the position that there were reasonable limits to what it should be called upon to supply—that it should not be required to supply *everything* desired by opposing parties—and in some respects it was sustained.

As showing how loathe the courts are to disturb procedural rulings of administrative agencies, we invite attention to the following from *Cella* v. *United States,* 208 F. 2d 783, 789 (1953), certiorari denied 347 U. S. 1016 (1954), where the Court (7 Cir.) said:

> ". . . in administrative hearings the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. [Citing cases] Administrative agencies should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' . . ."

And from *Reilly* v. *Pinkus,* 338 U. S. 269 (1949), a case cited by appellants (p. 37):

> "The power to refuse enforcement of orders for error in regard to evidence should be sparingly

exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. . . ." (p. 276)

The courts rely on the Interstate Commerce Commission for determination of the evidence it needs with which to discharge its duties in the public interest. Thus in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 513 (1944), this Court said:

". . . The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. . . ."

Appellants assert (p. 36) that Congress intended a proceeding of the character here involved to be adversary and not *ex parte*. We do not question this.[2] In this case, the Commission held extensive hearings and these were in no sense *ex parte*. At every step, the appellee met opposition from the appellants, and the entire proceeding before the Commission was a vigorously contested adversary proceeding. The immense record made before the Commission makes this manifest and completely refutes the appellants' contention that the proceeding was conducted in an *ex parte* fashion.

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[2]However, public hearings are not required on all railroad merger applications, the statute providing ". . . and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest." 63 Stat. 485 (1949); 49 U.S.C. §5(2)(b).

Question 5 Presents No Substantial Question.

The question bearing No. 5—"Did the District Court give full scope to its responsibilities with respect to judicial review?"—can be readily answered, emphatically and unequivocally, in the affirmative, and is clearly not a substantial question.

Appellants' thrust here is at the lower court's Conclusion of Law No. 6 reading:

> "An order of the Interstate Commerce Commission is entitled to great respect, representing as it does the opinion of a body of experts upon matters within the range of their special knowledge and experience. . . ." (p. 11, typewritten copy of decision; p. 10a of Appendix A to Appellants' Jurisdictional Statement)

Numerous decisions of this Court were cited by the Court to support this proposition, and they firmly support it.

Of these cases appellants refer only to *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474 (1951), evidently because they relied on that decision in the court below, mistakenly, as authority for the erroneous proposition that the Commission is "not nearly so expert as the federal judiciary on many of the issues in controversy"[3] or, as more fully stated orally by counsel for the City of Nashville:

> ". . . when you find these statements about the expertise of the Commission, they have to be confined to technical questions. Certainly the

[3]From p. 2 of appellants' brief in the court below.

> Interstate Commerce Commission has an expertise on technical rate-making matters, but on questions of the kind involved here, there is no expertise in the Commission that this Court doesn't have, . . ." (R. 49)

the point being, of course, that appellants wanted the court to substitute its judgment for that of the Commission, so long as such matters as rate-making were not involved. On such questions as are presented in a railroad merger case appellants would have it believed (p. 39) that the decision in the *Universal Camera Corp.* case "enlarged the scope of judicial review." Yet the fact is that in that decision this Court expressly referred to an administrative agency such as the Commission as—

> ". . . one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. . . ." (340 U. S. at p. 488)

and said further:

> ". . . Nor does it [Administrative Procedure Act] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress [by that Act] has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is

substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (340 U. S. at p. 488)

Dealing specifically with the Commission's functions in a merger case, this Court has clearly stated, in the *McLean Trucking Co.* case, as has earlier herein been shown:

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' . . ." (321 U. S. at pp. 87-88)

But appellants say (p. 39) in this case "the errors of law relied upon do not relate to matters of discretion within the special knowledge and experience of the Commission." Yet the Complaint in this case was a

veritable broadside at the Commission's decision, it being assailed not only because of alleged misinterpretation of the law and alleged procedural errors but also because the Commission found, erroneously it was charged, that the reduction in competition resulting from the merger would be consistent with the public interest; because of findings by the Commission that the merger would be productive of more efficient operation, of large savings, of a strengthening of the involved properties and enhancement of the adequacy of the service they provide and the best use of the facilities of the involved railroads, and that the advantages to the public in general outweigh the disadvantage to the single locality of Nashville (Complaint, par. 6, 8-12); because the Commission, it was alleged, committed error in not following a precedent (Complaint, par. 13); because, it was alleged, the Commission had accorded too much weight to the number and character of witnesses who supported the merger (Complaint, par. 15); and because, it was alleged, the Commission concluded "that the transactions will be consistent with the public interest" (Complaint, par. 16), as well as on various other grounds.

Here, it may well be said, as was said in *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, 544-545 (1949), affirmed 338 U. S. 902 (1949), a case involving action by the Commission under Section 5(2) of the Interstate Commerce Act:

> "The primary concern of the Commission here is the protection of the public interest. It has been repeatedly held that a very strong showing must

be made (and here there is no such showing) by one who seeks to set aside an order of the Commission in this field. [Citing cases]"

Finally, appellants assert, in dealing with this question, that "the Court did not say that, in making its determinations, it had reviewed the whole record, or such portions thereof as had been cited by counsel" (p. 39). Apparently appellants have not read the decision carefully, for the following statement, quoted earlier herein, appears at the very outset of it:

". . . The court has considered the pleadings and the proceedings and evidence adduced before the Interstate Commerce Commission, the entire record in the case, and the oral arguments and briefs of the attorneys for the plaintiff, for the defendants, and for all the interveners, constituting all the parties. . . ." (p. 1, typewritten copy of decision; p. 1a, Appendix A, Appellants' Jurisdictional Statement).

Questions 6 and 7 Present No Substantial Question.

Almost immediately after saying "the errors of law relied upon do not relate to matters of discretion within the special knowledge and experience of the Commission" (p. 39), appellants raise questions (Nos. 6 and 7 combined) as to whether the Commission committed "prejudicial errors . . . in evaluating the evidence" (p. 39).

Whereupon, appellants launch into a discussion of such matters as service improvements, best use of facilities, savings, efficiency, strengthening of the involved

properties, the extensive support from the shipping public for the merger and the lack of opposition from other railroads. These were matters which were the subject of elaborate proof, and argument, before the Commission.[4] Contrary to the contention of appellants, appellee showed that distinct improvements in service[5] would result from the merger, and the Commission expressly found that large savings would be accomplished and that it would result in greater efficiency, the best use of the facilities and the strengthening of the properties.[6]

The Commission also found:

> "Considerable evidence in support of the application was submitted by representatives of freight bureaus, manufacturing and traffic associations, chambers of commerce, and individual shippers throughout the entire territory served by the Kentucky and Tennessee companies, including the city of Nashville. . . ." (295 I. C. C. at p. 479)

following which the Commission epitomized the nature of such evidence (pp. 479-480). The Commission's report reveals not only no opposition from other railroads but support from two of them (pp. 480-481).

While the Commission's report and the record stand squarely against the arguments here advanced by the appellants, there can be no occasion to go into these sub-

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[4]As may be seen in our brief (pp. 7-91, 134-137) and our reply to exceptions (pp. 4-41, 80-85, 221-223), which were appended to the answer of the appellee.

[5]Please see *supra*, pp. 18-21.

[6]295 I. C. C. at pp. 491-493, 504.

jects fully here, for it is well established the Court will not reweigh the evidence and resolve such questions. Thus this Court plainly said in *United States* v. *Pan American Corp.*, 304 U. S. 156, 158 (1938):

> ". . . The value and weight of the evidence given by railroad and plant executives, and the inferences to be drawn from it, were for the Commission. . . ."

In *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547 (1912), this Court said:

> ". . . the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. . . ."

Please see also *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470 (1910); *Virginian Ry.* v. *United States*, 272 U. S. 658, 666 (1926); *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536 (1946); and *Baltimore Transfer Co.* v. *Interstate Commerce Commission*, 114 F. Supp. 558, 563-564 (1953), affirmed 346 U. S. 890 (1953).

The Court may very fittingly say here, we respectfully submit, as Mr. Justice Cardozo said, speaking for the Court, in *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286-287 (1934):

> ". . . The judicial function is exhausted when there is found to be a rational basis for the

conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report. . . ."

Question 8 Presents No Substantial Question.

Question 8 raises the question whether the Commission's report meets the requirements of the Administrative Procedure Act, specifically Section 1007 of 5 U.S.C.[7] The principal allegations of the Complaint on this subject were:

". . . that the report consists in the main of a running discourse reciting the contentions and statements of the parties, with no showing as to how the ultimate conclusions are related to such findings as are expressly or impliedly made. It is quite impossible to determine from the report which statements are findings and which are a mere recitation of contentions of the parties. The findings are not definite and clear and are not accompanied by clear statements of the reasons or basis therefor. . . ." (Complaint, pp. 17-18)

The Complaint proceeded to charge that the proposed report of the Examiner was of the same character and that an exception filed by the City of Nashville to his report on the same ground was not sustained (Complaint, p. 18).

If the criticism of the Commission's report were valid, and it is not, appellants should not be heard to

[7] 60 Stat. 237 (1946).

utter it, in view of the fact that they neglected altogether in their briefs to observe the requirement of the Commission, in its General Rules of Practice, that "[e]ach brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make,"[8] and again neglected, in their exceptions, to submit any proposed statements for substitution for those contained in the Examiner's report, as contemplated by the Commission's rules, such rules providing that when exceptions are taken to an Examiner's proposed report "a corrected statement *must be* incorporated"[9] (Italics ours) .

The Commission's report recites in great detail the important facts of the case and the contentions of the parties, together with preliminary findings of fact, and thereafter presents, at pages 502-506 (295 I. C. C. 457), its ultimate findings and conclusions. Those findings and conclusions are specific and clear, and there should be no difficulty on the part of anyone in understanding them or the reasons therefor.

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[8] 49 CFR §1.91(e). The rule in its entirety reads:

"*Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make."

[9] 49 CFR §1.96(a). The rule in its entirety reads:

"*Exceptions to officer's report*—(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page or part of the record relied upon to support the exception and a corrected statement must be incorporated."

Howbeit, it may be doubted that the Commission is required to make detailed findings as appellants seem to suppose. In *Alabama G.S. R. Co.* v. *United States*, 340 U. S. 216, 227-228 (1951), this Court said:

> "As to the contention of appellants that the Commission's order is not supported by essential findings of fact, §14(1) of the Interstate Commerce Act, 49 U.S.C. §14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 487, 489-490. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course §14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. [Citing cases] And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. [Citing cases] Here the Commission found, in conformity to the statute invoked, *supra* note 2, that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest.' And 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data . . . .' *United States* v. *Louisiana*, 290 U. S. 70, 80. Enough has been 'put of record to enable us to perform the limited task which is ours.' *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 212."

Dealing particularly with the basic requirements in a case such as this one, under Section 5(2) of the Interstate Commerce Act, the three judge court (E.D., La.) in *Herrin Transp. Co.* v. *United States,* 108 F. Supp. 89, 94 (1952), said:

> "In this case, the Commission was required by the Statute to make two basic findings: (1) that the proposed transaction is within the scope of Section 5(2)(a) of the Statute, and (2) that the proposed transaction would or would not be consistent with the public interest. These findings were made by the Commission. . . ."

The Commission made such findings, very explicitly, in this case, at pages 505-506 of its report (295 I. C. C. 457).

A contention such as that advanced here was advanced in *Baltimore Transfer Co.* v. *Interstate Commerce Commission, supra.* The Court there said:

> "Plaintiffs make the sweeping contention that the Commission's order of April 25, 1952, is 'inconclusive of the issues, arbitrary, capricious, discriminatory, premature, contrary to provisions of law and the evidence, and unsupported by the evidence.' But we find this contention to be wholly without merit. The Commission was required to make only two basic findings: (1) whether the proposed purchases by Quinn from Neale and Wadkins of their operating rights were within the scope of Section 5(2) (a) of the Act; and (2) whether these transactions would be consistent with the public interest. *Alabama Great Southern Ry. Co.* v. *United States,* 340 U. S. 216, 71 S. Ct.

> 264, 95 L. Ed. 225. We find that the Commission did make affirmative findings on both of these points, although the first is not in issue, since we do not understand that the plaintiffs question the Commission's authority under Section 5 to authorize transactions of this character. . . ." (114 F. Supp. 558, 564)

But, as we have indicated, and as anyone may see upon a careful reading of the elaborate report in this case, the Commission has gone far beyond what is required in its recitation of the evidence and the contentions of the parties and in setting forth the most lucid findings and conclusions.

Appellants say (p. 44) "it is difficult to ascertain just which contentions of the applicants are actually accepted, and why." A single illustration should suffice to show how baseless this charge is.

One of the contentions of appellee, as showing the need for the merger, was that the growth of competition by other modes of transportation has been materially aided by tremendous government expenditures which have been steadily and substantially increasing. The Commission recited[1] the undisputed facts relating to such government expenditures and thereafter said, as we have hereinbefore shown:

> "The foregoing reflects how imperative it is for the railroads to do everything in their power to enhance their competitive situation through all possible economies and efficient operations. The proposed merger is designed to accomplish that result." (p. 468)

[1] 295 I. C. C. at pp. 467-468.

Appellants say (p. 44): "The ultimate findings or conclusions, in the language of the statute, are not based on subsidiary findings that can be easily identified, and for which 'the reasons or basis' are stated, . . ." Another illustration should suffice to show the complete lack of foundation in this charge.

A matter of major importance in the case was the economies which might be realized from the merger. The evidence was reviewed at pages 488-493 of the Commission's report (295 I. C. C. 457), near the conclusion of which the following statement was made:

> ". . . This amount added to the foregoing similar savings to be effected in the traffic and operating departments, mentioned heretofore, produces estimated annual reduction in cost of all departments resulting from the merger of $3,243,123." (pp. 491-492)

The Commission proceeded thereafter with a further discussion of the subject and concluded with this finding:

> ". . . It is apparent from the record that the combined properties will be operated more efficiently than they are now under separate managements, and that the savings to be realized from the unified operations will approximate those estimated by applicants." (p. 493)

Included in its ultimate conclusions was the following:

". . . Applicants . . . identify aggregate savings of more than $3 million per year, with other possible savings[2] . . ." (p. 504)

Is there any trouble connecting or relating this ultimate conclusion to earlier and preliminary or subsidiary findings? Is there any difficulty understanding the reasons and basis for the conclusion on this phase of the case?

Patently based on the economies detailed in those portions of the report we have cited, considered together with its findings as to competition, particularly with other modes of transportation, and rising costs,[3] the ultimate conclusions contained also the following:

". . . The elimination of the Tennessee Company as a separate entity will avoid many duplications of accounting, reporting, etc., between carriers and to regulatory authorities, and the corporate components of the surviving company will be simplified, all in the public interest.

"Combining the facilities and resources of the Kentucky Company and the Tennessee Company under one management would give better control of mounting operating costs and enable the surviving company to meet more effectively competition from other modes of transportation. The anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad.

"Single ownership and control of the properties will tend toward a more economical and ef-

[2]As to such "other possible savings" please see the preliminary findings on this subject at pp. 492-493.

[3]295 I. C. C. at p. 479.

> ficient operation which, in turn, will inure to the benefit of the shipping public. Compare *Bessemer & L.E. R. Co. Merger,* 275 I. C. C. 167, 179. It will also, in this case, result in desirable corporate simplification, will reduce accounting work with its attendant expenses, and will materially reduce the number of reports which must now be filed individually by the applicants with regulatory commissions and other public authorities." (295 I. C. C. at pp. 504-505)

Are not these findings and conclusions clear and certain, enabling anyone to understand the reasons and basis for the action of the Commission on material issues of fact before it? Do not they put completely at rest the contention that the report is largely a running discourse of contentions without any indication of how the conclusions were reached?

Appellants say (p. 44) that "[i]n the main the [Commission's] report is merely a verbatim report of the proposed report of the Examiner," with the addition of the brief statement which is quoted. A detailed comparison of the two reports will reveal many differences in them, but aside from that it should be pointed out that the Examiner prepared a very comprehensive and painstaking report to which the appellants filed very brief exceptions. We invite a comparison of the Examiner's report with appellants' exceptions, both of which are in the record certified to this Court.

Appellants next assert (p. 44) that it is impossible to determine from the report just how, where and in

what respects the merger "would enhance adequacy of service by the merged companies, and would constitute the best use of the facilities," as found by the Commission.

These conclusions follow logically from the whole report and numerous subsidiary findings, some of which have been referred to herein.[4] Others may readily be cited, *e.g.*:

> ". . . The gist of such testimony [by shippers] was to the effect that the merger would benefit the public by providing single-line service, without interchange, to many points not now available . . ." (295 I. C. C. at p. 479)
>
> . . . . . .
>
> ". . . If the merger is consummated, all the routes now available to shippers over the separate lines will be available via the surviving company on single-line hauls." (p. 486)

And:

> ". . . The merger also will result in efficiency by the surviving company's enjoying longer hauls on substantial volumes of traffic, and substantial increased revenues because of the great concentration of this traffic via the relatively shorter and more economical routes." (p. 477)

It is thus clearly seen that the basis for the report's conclusion is not "foggy" as charged by the appellants (p. 44), but on the other hand that appellants manifestly present here no substantial question.

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[4] *Supra*, pp. 13-14, 18-21, 30.

In *Capital Transit Co.* v. *United States*, 97 F. Supp. 614, 621 (1951), a three-judge court (D., D.C.) said, in circumstances similar to those present here:

> "The Commission here made its ultimate findings in the terms of the Motor Carrier[s] Act, which authorizes issuance of a certificate of convenience and necessity when it is found 'that the applicant is fit, willing, and able properly to perform the service proposed and to conform to * * *' the requirements of law 'and that the proposed service * * * is or will be required by the present or future public convenience and necessity * * *.' In addition, Division 5 of the Commission filed a lengthy opinion setting out the facts in detail and the considerations which it deemed applicable in reaching its conclusion. Certainly more than 'Enough has been "put of record to enable us to perform the limited task which is ours"' *Alabama Great Southern R. R. Co., et al.* v. *United States*, 340 U. S. 216, 71 S. Ct. 264, 272. And the Administrative Procedure Act does not require detailed findings of every subsidiary evidentiary fact. So long as the agency makes amply clear the factual basis upon which it has proceeded, there can be no ground for complaint. . . ."

In *Baltimore & O. R. Co.* v. *United States*, 201 F. 2d 795, 798 (1953), the Court (3. Cir.) said, dealing with the requirement of the Administrative Procedure Act here referred to:

"A similar requirement is found in Federal Rules of Civil Procedure No. 52(a),[5] 28 U.S.C., which requires of the trial judge in a case tried to the court to 'find the facts specially and state separately its conclusions of law thereon * * *.'

"This court and others have held that if the trial judge makes his findings and they are sufficiently clear to see what he has found, it is not reversible error if he does not list them in a 1-, 2-, 3-, 4- order, although it is exceedingly convenient when they are so spelled out and numbered. The same latitude should be allowed a commission or board, although it may be remarked in passing that it is always helpful to a court called upon to review agency action to have the fact-findings of such agency clearly and categorically stated."

Here the agency has clearly and categorically stated its findings and conclusions and gone far beyond the "bare bones" requirement which the Court there held specifically meets the requirements of the statute.

Question 9 Presents No Substantial Question.

Appellants merely say that this question—"Was the conclusion 'that the transaction will be consistent with the public interest' supported by the record?"—

[5]Concerning which this Court has said in *Timken Co.* v. *United States*, 341 U. S. 593, 597 (1951), as might well be said of the Commission's hearings and report in this case:

". . . . In the present case, the trial judge after a patient hearing carefully analyzed the evidence in an opinion prepared with obvious care. Appellant's lengthy brief has failed to establish that there was error in making any crucial, or even important, ultimate or subsidiary finding. Since we cannot say the findings are 'clearly erroneous.' we accept them. Fed. Rules Civ. Proc., 52(a)."

should be answered in the negative for reasons they have given earlier.

The reasons we have hereinbefore[6] set forth show not only that the question cannot be so answered but that the question itself is devoid of any substantial character.

As we have shown, this Court, in the *McLean Trucking Co.* case, has definitively held; referring to action by the Interstate Commerce Commission in a merger case:

> ". . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' . . ." (321 U. S., pp. 87-88)

Question 10 Was Not Raised Below and in Any Event Is Not a Substantial Question.

Question 10 is stated (p. 45) as:

> "Is it a matter of national concern (assuming that the order is otherwise valid) whether the two railroads 'consolidate' under state law or 'merge' under nonexistent law; and if so, is that issue justiciable in this cause?"

The two questions thus presented were not presented below, and therefore cannot properly be considered here. Furthermore, the assumption indulged in the question that there is a Tennessee law covering consolidations but that railroad mergers are not

[6] *Supra*, pp. 11-21, 30, 41-44, 65, 73-75.

covered by any Tennessee law is, in our view, an erroneous one, as will hereinafter be indicated.

A somewhat similar question was raised by paragraph 17 of the Complaint. It was that "if the order of the Commission dated March 1, 1957, be construed as granting the applicants authority, without authorization by Tennessee law, to merge the Tennessee Company into the Kentucky Company, said order is to that extent void and of no effect"; that the charter of the N.C.& St.L. contains no provision authorizing it "to extinguish or abandon its corporate existence and franchises by merger into a corporation of another state"; and "that there is no general law in Tennessee which authorizes a railroad corporation incorporated by special act to extinguish or abandon its corporate existence and franchises in this manner" (Complaint, pp. 19-20).

An adequate answer to any such question is to be found in the concluding words of Section 5(11)[7] of the Interstate Commerce Act, reading:

> ". . . any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Appellants charged, further, that if Section 5 of the Interstate Commerce Act "be construed as attempting to confer upon the Commission the power and authority to supply such statutory authority, where

[7] 54 Stat. 908 (1940); 49 U.S.C. § 5(11).

not supplied by state law, then Section 5 of the Interstate Commerce Act, as so construed, violates the Tenth Amendment to the Federal Constitution and is unconstitutional and void" (Complaint, p. 20).

By Conclusion of Law No. 2, the court held that Section 5(2) is constitutional, citing *United States* v. *Lowden,* 308 U. S. 225 (1939), which is squarely in point, and by Conclusion of Law No. 3 it held that under Section 5(2)[8] of the Interstate Commerce Act the Interstate Commerce Commission "is empowered to authorize the merger of two or more railroads without regard to the provisions of law of any State, except that State law, if any, may govern the size of the stockholder vote required for approval of a merger" (p. 10, typewritten copy of decision; pp. 9a-10a, Appendix A, Appellants' Jurisdictional Statement).

There can be no doubt of the correctness of the lower court's decision on these points and no doubt of the utter unsubstantiality of any contention that there is room for the operation of state law, except only as specified by the court below, in cases of this kind. Such questions are settled by *Texas* v. *United States,* 292 U. S. 522, 528-529 (1934); *Seaboard Air Line Railroad Co.* v. *Daniel,* 333 U. S. 118, 124-127 (1948); and *Schwabacher* v. *United States,* 334 U. S. 182, 191-199 (1948). Please see also the Commission's clear statement on the subject at 295 I. C. C. 457, 459.

[8]Which should be read with Section 5(11). These two paragraphs—2 and 11 of Section 5 of the Interstate Commerce Act—are reproduced in Appendix C hereto (24 Stat. 380 (1887), as amended; 49 U.S.C. § 5).

The decision of this Court in *United States* v. *Lowden* cited by the lower court is a direct and positive ruling that Section 5(2) (then Section 5 (4)) is constitutional.

Appellants say (p. 49) they believe *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315 (1935), is directly in point on the question whether or not Section 5(11) of the Interstate Commerce Act violates the Tenth Amendment, that case having been concerned with an enactment of Congress which attempted to authorize the conversion of state building and loan associations into Federal institutions without the consent of the state. But this Court was careful to point out (296 U. S., at p. 338), "We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." Section 5(11) of the Interstate Commerce Act specifically makes the authority of the Commission over rail mergers "exclusive and plenary", and in *Schwabacher* v. *United States*, 334 U. S. 182, 198, this Court held that this provision "argues with equal force that federal law is also plenary and exclusive." This Court further said (p. 198): "We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. In matters within its scope it is the supreme law of the land."

Appellants say (p. 49) that here, there is presented an issue not with respect to positive provisions of the law of Tennessee but with respect to the absence of any provision of law authorizing a merger. The answer to this is, first, that there is a Tennessee statute sufficiently broad to cover mergers of railroads;[9] second, that the issue as stated by appellants is raised too late, not having been raised below; and, third, that in any event it is a distinction without a difference.

Question 11 Presents No Substantial Question.

Question 11 is stated by appellants as being whether they had standing to attack the Commission's order in this case on the ground that the Mercantile-Safe Deposit & Trust Company of Baltimore was not a party to the application and the Commission did not

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[9]A certified copy of it—Section 2610 of Williams Tennessee Code (now Section 65-601 of Tennessee Code Annotated)—appears in the record as Exhibit H-58 (Tr. 1370-1, 1644). It reads:

"*All railroad companies of this state, and any other state or states, are empowered to* build, lease or let, *acquire* by purchase, lease *or otherwise*, and operate, hold, or dispose of any railroad or railroads in any state or states, or any parts or portions of any such railroad or railroads, and the distribution thereof, as may be determined upon by their stockholders, and to acquire by purchase or otherwise, and hold or dispose of any bonds or shares of the capital stock of any railroad company or companies in any state or states, and to indorse and guarantee the bonds of any railroad company or companies in any state or states, whose original charter of incorporation was granted by the State of Tennessee; provided, that the same be approved by the vote of three-fourths in amount of the capital stock of said company present and voting, either in person or by written proxy, at a regular or called meeting of the stockholders of said company; and provided further, that ten days' notice be given in a Memphis, Knoxville, and Nashville daily newspaper, of the time, place, and purpose of the meeting." (Italics ours.)

find as to it that acquisition of control of the N.C.& St.L. would be in the public interest.

This is not a question of any substance whatever.

At page 13 of the merger application, which bears date of January 26, 1955, it was shown that the Mercantile-Safe Deposit & Trust Company is the principal stockholder, and that Safe & Company (affiliated with such Trust Company) is the second largest stockholder, of The Atlantic Coast Line Company. The Atlantic Coast Line Company was made a party to the application. The question whether Mercantile-Safe Deposit & Trust Company itself was a necessary party to the proceedings before the Commission was raised by the appellants for the first time in the District Court, their Complaint having been filed March 29, 1957.

The facts are set forth in the court's Finding of Fact No. 3 (p. 3, typewritten copy of decision; p. 3a, Appendix A, Appellants' Jurisdictional Statement) and need not be repeated here. The court below held:

> "9. The plaintiff and the intervening plaintiffs complain of the failure of the railroads, in the proceeding before the Commission, to join as an applicant the Mercantile-Safe Deposit & Trust Company, shown by the application to be the principal stockholder of The Atlantic Coast Line Company. Neither the plaintiff nor any intervening plaintiff has shown wherein such failure adversely affects any of its legal interests. The Court holds that the failure to join the Mercantile-Safe Deposit & Trust Company was not a jurisdictional defect and does not affect the validity of

the Commission's order herein; and that such failure, not being a jurisdictional defect and not having been raised in the proceeding before the Commission, cannot be raised now for the first time before this court.

"In *Alleghany Corp.* v. *Breswick & Co.*, —— U. S. ——, decided April 22, 1957, it was held that 'the failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction.'

"In *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37, the Supreme Court said: 'Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice'." (pp. 12-13, typewritten copy of decision; p. 12a, Appendix A, Appellants' Jurisdictional Statement).

These conclusions of law are unquestionably correct. The parallel between the question presented to the lower court and that presented to this Court in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), is a very direct one. There the Court said:

"Appellees also urge that the *Marshall Transport* case, 322 U. S. 31, requires dismissal of Alleghany's application because two stockholders, alleged to dominate Alleghany, did not join in the application and therefore in the absence of those two indispensable parties, the Commission had no jurisdiction to proceed. But in the *Marshall*

Transport case, the Commission was refusing to approve a subsidiary's application to acquire control of the property and operating rights of another carrier unless the non-carrier parent submitted itself to the Commission's jurisdiction, and the Court upheld the Commission's power to refuse to approve the application.

"Although the Court in that case used language of 'jurisdiction,' the problem is not strictly jurisdictional . . . The failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction. Since that is so, the status order submitting Alleghany to the Commission's jurisdiction cannot be attacked on that basis." (353 U. S. 151, at pp. 171-172)

Even if Mercantile-Safe Deposit & Trust Company controlled The Atlantic Coast Line Company (which we do not admit), the remedy would not be invalidation of the Commission's order in a case of this kind but, as the opinion in the cited case makes clear, a proceeding under Section 5(7), (8) and (9)[1] of the Interstate Commerce Act (353 U. S. at p. 162).

United States v. *Tucker Truck Lines,* 344 U. S. 33 (1952), cited by the lower court, is squarely in point on the proposition that the question was not timely raised by the appellants. To the same effect is *Unemployment Comm'n* v. *Aragon,* 329 U. S. 143, 155 (1946).

This Court's decision in the *Alleghany* case shows clearly the correctness of the lower court's ruling that appellants have not shown that failure to join Mercantile-Safe Deposit & Trust Company as a party ap-

[1] 54 Stat. 908 (1940); 49 U.S.C. 5(7), (8) and (9).

plicant adversely affects any of their legal interests. The test was thus stated in 353 U. S. at p. 160, footnote 5:

> ". . . has the action of the administrative agency threatened the interests of the complainant, whether corporation or, as here, stockholder otherwise qualified to sue, sufficiently to allow attack? (This does not mean of course that the same agency action that allows attack by one allows attack by the other.)"

Again, at page 173, the Court pertinently said:

> "The reference in §5 to 'interested parties,' like the reference in §1(20) to 'party in interest,' must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a legislative hearing and 'interest' is not equivalent to 'concern.' It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standing—*e. g.*, 'the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order.' *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119. In each case, the sufficiency of the 'interest' in these situations must be determined with reference to the particular context in which the party seeks to assert its position."

It is clear that the appellants cannot show any legal interest in the question, their interest, if any, being at the level of the merger of the N.C.& St.L. into the L.& N.

Question 12 Presents No Substantial Question.

The final question raised by appellants (p. 52), whether there should be a reversal of the lower court's decision because thirty days did not elapse from the date of service of the Commission's initial order until its effective date, is thoroughly technical and an altogether unsubstantial one.

In paragraph 19 of its Complaint the City of Nashville alleged that the order of the Commission dated March 1, 1957, is void because the order, though dated March 1, 1957, was not released until March 13, 1957. The City cited Section 15(2) of Title 49, U. S. Code, which provides that certain orders of the Commission shall take effect "within such reasonable time, not less than thirty days . . . according as shall be prescribed in the order." The City recited in its Complaint (p. 21) that the order of the Commission provided, in the last paragraph thereof, that such order "shall become effective 40 days from its date."

Appellants interpret the language last quoted to mean a day certain, April 9, 1957.[2] The latter date is only twenty-seven days after March 13, the date of release, and, therefore, three days less than the mini-

[2]A permissible interpretation would be that the Commission intended, if such be necessary to the validity of the order, that the order become effective thirty days after *service* of the order. Please compare *Donner Steel Co.* v. *D., L. & W. R. R. Co.*, 92 I. C. C. 595, 597 (1924), where the case was decided June 7, the report served June 29, and a corrected reprint served July 15. The Commission held that a petition for rehearing, required to be filed within sixty days, was timely filed August 30, such date being only "45 days after the *service* of the corrected reprint." (Italics ours.)

mum period set by Section 15(2)[3] if such period be computed from the date of release.

By its order dated April 3, 1957, a copy of which was filed as Exhibit A to the answer of the defendant railroads to the Complaint of the employee group herein, the Commission ordered "that the effective date of the order be postponed from April 9, 1957, to April 12, 1957." Thus, if there had been any merit to the City's contention that the Commission's order of March 1 was erroneous because its effective date was twenty-seven rather than thirty days after the date of release of the order, this three-day extension of the effective date would have corrected the error.[4]

Furthermore, the Commission, on April 12, 1957, issued an additional order[5] in this proceeding by which the effective date of the Commission's order of March 1, 1957, was "postponed until further order of the Commission." The order of April 12 recited the fact that on April 2 the District Court had issued its order staying and suspending the Commission's order pending hearing and decision by a three-judge court." Thus, if there was any infirmity in the Commission's

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[3]24 Stat. 384 (1887), as amended.

[4]Please compare *State of Florida* v. *United States*, 31 F. 2d 580 (1929), where the three-judge District Court for the Northern District of Georgia said:

> ". . . This clarifying order is not to be esteemed a new order, or even an amendment extending the former one, but is only a clarification of that which was found before to be uncertain, and, though made without further hearing, or evidence, is none the less effective from its date, at least. . . ." (p. 581)

[5]A copy of the April 12 order was attached as Exhibit No. 1 to the appellee's Answer to the amendments to Complaint filed herein by the City and the intervening plaintiffs.

order of March 1, it was rendered innocuous by the indefinite postponement of the order's effective date.

Finally, after Judge Martin's restraining order had been dissolved by the three-judge court, the Commission, on July 10, 1957, issued a further order, the concluding paragraph of which reads:

> "*And it is further ordered,* That the report and order dated March 1, 1957, shall become effective 30 days from the date of service of this order."

The service date of the order was July 15, 1957, so that the Commission's order became effective August 14, 1957.

We furthermore direct the Court's attention to the fact that it has held that the thirty-day requirement of Section 15(2) applies only to orders entered under Section 15(1) of the Interstate Commerce Act, and to the fact that the order in the case at bar was not entered under Section 15(1) but under Section 5(2). *United States* v. *American Ry. Express,* 265 U. S. 425, 430, note 3 (1924).

For these reasons it is abundantly clear that appellants' final question presents nothing substantial.

Conclusion.

In their statement under the heading "Jurisdiction," at pages 2-4, appellants suggest that this Court may not have jurisdiction of the appeal because the court below was not properly constituted. The statute involved, Section 2284(1),[6] as is stated in footnote 2 on

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[6] 62 Stat. 968 (1948); 28 U.S.C. §2284(1).

page 4, requires "the chief judge of the circuit" to designate "two other judges, at least one of whom shall be a circuit judge." The statute contemplates that the third member of the Court shall be the District Judge before whom the action was brought. In this case the District Judge had become incapacitated, before any hearing in this cause, due to a heart attack. The designation order, executed April 9, 1957, by the chief judge of the Sixth Circuit, reads in pertinent part:

> ". . . I hereby designate the judges to constitute such court as follows: The Honorable John D. Martin, Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, and the Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky. The said hearing to begin on Tuesday, May 7th, and continue through May 8th and for such further time as is necessary to complete it and to make final determination therein."

The clear intent of the statute is that the court should be so constituted, and in the circumstances present here it could only be held, we submit, that the court was properly constituted.

There is obviously, then, no more to this suggestion of appellants than there is to the variety of questions listed for the Court's consideration, all such questions being, as we have been at pains to show, thoroughly devoid of substance.

Such being the case, it is respectfully submitted the judgment and decree of the court below should be affirmed, and, accordingly, we ask that the motion submitted at the outset hereof be granted.

Respectfully submitted,

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R. W. HENRIOTT,
J. L. LENIHAN,
L. & N. Building,
Louisville 1, Kentucky,

JOHN J. HOOKER,
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Nashville 3, Tennessee,

WILLIAM H. SWIGGART,
930 Broadway,
Nashville 3, Tennessee,

Attorneys for Appellee Louisville and Nashville Railroad Company.

PROOF OF SERVICE.

I, W. L. Grubbs, one of the attorneys for appellee Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Motion to Affirm and Brief in support thereof on appellants by mailing copies thereof, in duly-addressed envelopes, with first-class postage prepaid (except that in the case of the addressees located in Washington, D. C., air-mail postage prepaid has been employed), to their attorneys of record, as follows:

Mr. William Waller,
Waller, Davis & Lansden,
American Trust Building,
Nashville 3, Tennessee.

Messrs. La Roe, Winn & Moerman,
Investment Building,
Washington 5, D. C.

Messrs. Walter Harwood and Judson Harwood,
Nashville Trust Building,
Nashville 3, Tennessee.

Hon. George F. McCanless, Attorney General,
State of Tennessee,
State Supreme Court Building,
Nashville 3, Tennessee.

Hon. Henry C. Foutch, Asst. Attorney General,
State of Tennessee,
State Supreme Court Building,
Nashville 3, Tennessee.

Hon. Allison B. Humphreys, Solicitor General,
State of Tennessee,
State Supreme Court Building,
Nashville 3, Tennessee.

Hon. Harold Seligman, General Counsel,
Tennessee Public Service Commission,
Nashville 3, Tennessee.

Hon. Elmer D. Davies, Jr., County Attorney,
County of Davidson,
Nashville 3, Tennessee.

This 6th day of September, 1957.

W. L. GRUBBS,

ILLINOIS
MO.
ARK.
TENNESSEE
KENTUCKY
ALABAMA
NORTH CA
WEST VIRGIN
ST. LOUIS
EAST ST. LOUIS
MC LEANSBORO
MT. VERNON
CRAWF
LOUISVILLE
EVANSVILLE
CINCINNATI
NEWPORT
LATONIA
MAYSVILLE
CHARLESTON
KANAWHA
OHIO
RIVER
CHRISTIANSBURG
PARIS
FRANKFORT
LEXINGTON
WINCHESTER
SPRINGFIELD
HAZARD
DEANE
FLEMING
OWENSBORO
ELIZABETHTOWN
HARTFORD
HENDERSON
CLAY
ATKINSON
SHAWNEETOWN
LEBANON
CAVE CITY
GREENSBURG
CORBIN
PINEVILLE
HARLAN
LYNCH
NORTON
CLINCHFIELD
ST PAUL
GLASGOW
BOWLING GREEN
ELKTON
RUSSELLVILLE
SCOTTSVILLE
JELLICO
MIDDLESBORO
DOSSETT
OAK RIDGE
KNOXVILLE
WINDROCK
HARTSVILLE
GALLATIN
NASHVILLE
SPARTA
HARRIMAN
PIKEVILLE
MARYVILLE
JENA
TELLICO PLAINS
MURPHY
BLUE RIDGE
SOU. R. R.
SPARTANBURG
CHATTANOOGA
ATHENS
ETOWAH
TULLAHOMA
PALMER
LEWISBURG
COLUMBIA
HOHENWALD
JACKSON
MILAN
MC KENZIE
PARIS
BRUCETON
MT. BOLDT
MEMPHIS
FLORENCE
SHEFFIELD
DECATUR
HUNTSVILLE
GUNTERSVILLE
HOBBS ISLAND
Ferry
LEHIGH
WARRIOR
TUSCALOOSA
PRACO
BIRMINGHAM
ANNISTON
CALERA
SYLACAUGA
GADSDEN
CARTERSVILLE
MARIETTA
ATLANTA
GA. R.R.
AUGUSTA
C. B
A & W. PT.
WINSTON-

APPENDIX B.

Examples of Requests on Applicants, by Those Opposing Application, for Data Beyond That Required in the Special Rules of Practice Relating to Applications Under Sec. 5(2) and Sec. 20a.

1. June 10, 1955

Counsel Requesting:
MR. LaROE

Requested by letter dated June 10, 1955:

(a) Written agreements between the applicants with respect to the solicitation and routing of freight, together with routing circulars and amendments implementing such agreements; also any correspondence on that subject in the past ten years.

(b) Correspondence between the applicants with reference to the advantages and disadvantages of the proposed merger, including studies showing estimated savings and costs in traffic, improvements in service to the public, etc.

(c) The most recent audit reports of the applicants.

(d) Correspondence between N.C.& St.L. and other railroads in the past ten years in regard to routings and proposed routings which would compete with L.& N. routes or with routes in which the L.& N. participates.

The audit reports and the routing circular with amendments thereto and certain correspondence pertaining thereto were supplied.

2. July 11, 1955 — **Counsel Requesting: MR. BOLES**

Requested by letter dated July 11, 1955:

(a) Statement of the excess of amortization over normal depreciation, and tax deferments from amortization, for the L.& N. and the N.C.& St.L. for the years 1950 to 1954, inclusive.

(b) Restatement of L.& N. and N.C.& St.L. income accounts for the years 1950 to 1954, inclusive, and the first six months of 1955, to show what the earnings of each company would have been for the years and periods stated had each not had the benefit of the substantial tax reduction resulting from amortization.

(c) Statement of estimate of losses, if any, in traffic (carloads or tonnage) and in revenue expected to result from merger.

(d) A statement giving an estimate of the increases, if any, in traffic (carloads or tonnage) and in revenue expected to result from the proposed merger.

(e) A statement giving details of the savings expected to result from:

(1) Coordination of train and terminal operations.

(2) Consolidation of repair shops.

(3) Combining the accounting and clerical work on joint traffic.

(4) Merging the rate and sales force of the two companies.

(5) Reduction in supervisory forces.

Counsel Requesting

2. **July 11, 1955 (Continued)** — MR. BOLES (Continued)

(f) A copy of the lease under which the N.C.& St.L. operates the line of road between Chattanooga and Atlanta.

(g) A copy of the lease under which the N.C.& St.L. operates the line of road between Paducah and Memphis.

(h) A statement showing by major projects, and estimated costs thereof, all additions, betterments, and improvements to roadway and structures and to equipment contemplated by the L.& N. and the N.C.& St.L. for the current year and such additional period as will be required to complete the projects now in contemplation.

All of the foregoing information was supplied.

3. **July 21, 1955**

Requested by letter dated July 21, 1955: — MR. BOLES

(a) Freight and passenger car statistics of the L.& N. and the N.C.& St.L.

(b) Information as to the percentage of the N.C.& St.L. stockholders voting for and against the merger.

The foregoing information was supplied.

4. **August 24, 1955**

Requested (Tr. 200-201): — MR. WALLER

(a) The number of revenue cars handled in and out of Nashville by the L.& N. and N.C.& St.L. for the years 1953 and 1954.

This information was supplied.

5. August 24, 1955 — Counsel Requesting: MR. WALLER

Requested (Tr. 211):

(a) Correspondence relating to two changes in the routing agreement between the L.& N. and N.C.& St.L.

This correspondence was supplied.

6. August 24, 1955

Requested (Tr. 222): — MR. WALLER

(a) The record of tons interchanged between the L.& N. and N.C.& St.L. at Nashville for the years 1951 through 1954.

This information for 1953 and 1954 was supplied.

7. August 24, 1955

Requested (Tr. 236): — MR. WALLER

(a) Written report made by Mr. Tilford to the Board of Directors of the L.& N. giving the reasons for the merger.

This information was supplied.

8. August 24, 1955

Requested (Tr. 288): — MR. BOLES

(a) Number of shares of minority stock of N.C.& St.L. voting for and against the merger.

This information was supplied.

9. **August 24, 1955** — **Counsel Requesting: MR. BOLES**

Requested (Tr. 289):

(a) Number of shares owned by L.& N. and affiliates voting for and against the merger.

This information was supplied.

10. **August 24, 1955** — **MR. BOLES**

Requested (Tr. 305-306):

(a) The location and number of traffic solicitors of the L.& N. before and after the merger.

This information was supplied.

11. **August 24, 1955** — **MR. BOLES**

Requested (Tr. 311):

(a) Coal tonnage terminating on the L.& N.

(b) Average coal ton-mile rate.

The information in (a) was supplied. The information in (b) was not available.

12. **August 24, 1955** — **MR. LYMAN**

Requested (Tr. 334-335):

(a) A showing for the L.& N. and N.C.& St.L. of all points where job changes will result from the merger.

(b) The nature of the changes at each such point.

(c) The number of employees in each craft that will be involved at each of these points, both as to jobs abolished or jobs added.

This information was supplied.

13. August 25, 1955 — Counsel Requesting:

Requested (Tr. 521): — MR. WALLER

(a) Assessments of the L.& N. for the year 1954 in each state in which it operates and the ad valorem taxes paid in each of those states.

The information was not supplied.

14. August 26, 1955

Requested (Tr. 822): — MR. BOLES

(a) Proposed N.C.& St.L. expenditures for repairs and additions and betterments in the Roadway and Mechanical Departments for 1955.

This information was supplied.

15. August 26, 1955

Requested (Tr. 831-832): — MR. WALLER

(a) The number of N.C.& St.L. accounting employees now and in 1947.

This information was supplied.

16. August 26, 1955

Requested (Tr. 997): — MR. BOLES

(a) Equipment trust maturities for the L.& N. and the N.C.& St.L. for 1954.

This information was supplied.

17. **August 31, 1955** — Counsel Requesting: MR. HARWOOD

Requested (Tr. 1529):

(a) The basic data from which Exhibit H-62 was made.

Applicants agreed to make the underlying data available to him and did the equivalent through the issuance of a corrected sheet 1 to Exhibit H-62.

18. **September 13, 1955** — MR. BOLES

Requested (Tr. 1692):

(a) Tonnage interchanged at Nashville between L.& N. and N.C.& St.L. for the years 1951-54.

This information for the years 1953-1954 was supplied.

So great had been the calls of this kind on applicants, notwithstanding the completeness of their presentation under the Commission's requirements, that as the final hearing was coming to a close, counsel for applicants quite justifiably used this language ". . . we have had to make up so many figures and so much stuff at the request of the other parties in this record . . ." (Tr. 1697).

APPENDIX C.

Reproduction of Constitutional and Statutory Provisions Referred to in the Brief

Amendments to The Constitution of the United States

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

TITLE 5 U. S. C.

§ 1007. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decisions upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

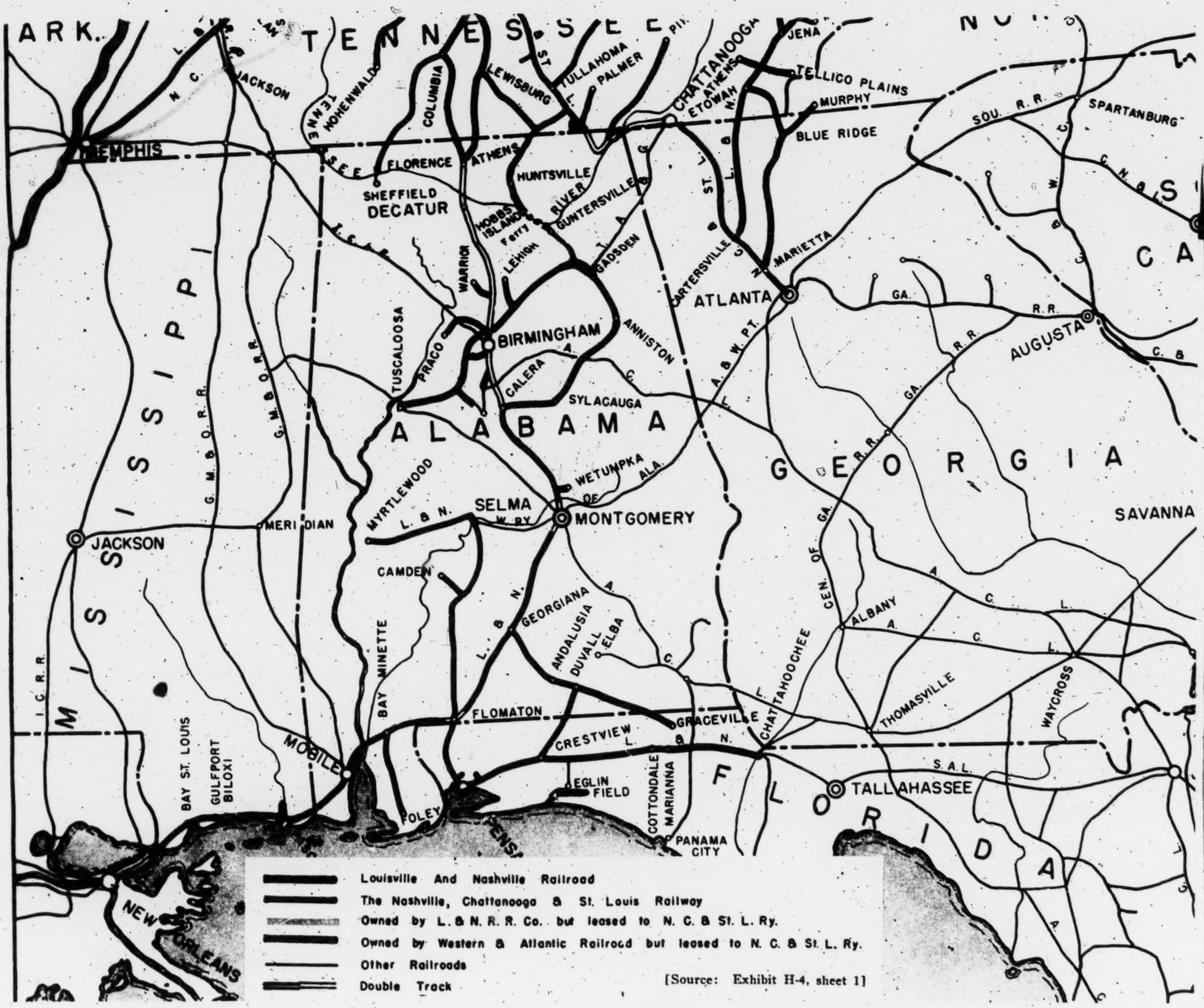
TITLE 15 U. S. C.

§ 4. Jurisdiction of courts; duty of district attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.



Louisville And Nashville Railroad

The Nashville, Chattanooga & St. Louis Railway

Owned by L. & N. R. R. Co. but leased to N. C. & St. L. Ry.

Owned by Western & Atlantic Railroad but leased to N. C. & St. L. Ry.

Other Railroads

Double Track

[Source: Exhibit H-4, sheet 1]

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Preceding § 1

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantage of each; to promote safe, adequate economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to co-operate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

§ 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through

ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of

the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Investigation by Commission of effectuation of control by non-prescribed methods

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this

chapter; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

Jurisdiction of injunctions, etc., against violations of section or orders

(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Supplemental orders by Commission

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

Plenary nature of authority under section

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this

section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

(2) **Orders of commission.** Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

(8) **Shippers choice of route to be observed.** In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this chapter to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this chapter provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.